1990

Richard W. Ringwood v. Foreign Auto Works, Inc., Howard R. Francis, Massimo C. Poggio, Rebecca Jane Poggio, Anthony Hernandez, and Hugh Gardener : Massimo "Max" Poggio and Foreign Auto Works, Inc. v. Hugh Gardener and Anthony R. Hernandez : Brief in Opposition to Certiorari

Utah Supreme Court

BRIEF

IN THE UTAH SUPREME COURT

--oooOooo--

RICHARD W. RINGWOOD,

Plaintiff,

vs.

FOREIGN AUTO WORKS, INC., HOWARD R. FRANCIS, MASSIMO C. POGGIO, REBECCA JANE POGGIO, ANTHONY HERNANDEZ and HUGH GARDNER,

Defendants.

Case No. 900085

From the Utah Court of Appeals' Opinion dated January 2, 1990

In Case Nos. 870540-CA
870541-CA &
870544-CA
(Consolidated)

MASSIMO "MAX" POGGIO and FOREIGN AUTO WORKS, INC.,

Plaintiffs,

vs.

HUGH GARDNER and ANTHONY R. HERNANDEZ,

Defendants.

--oooOooo--

MASSIMO "MAX" POGGIO AND FOREIGN AUTO WORKS, INC., BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

Dallas H. Young, Jr.
IVIE & YOUNG
P.O. Box 672
48 North University Avenue
Provo, Utah 84601

Attorneys for Ringwood

Jeril B. Wilson
100 East Center, Suite 2100
Provo, Utah 84601

Attorney for Poggio and Foreign Auto Works, Inc.

Val R. Antczak
Julia c. Attwood
PARSONS, BEHLE & LATIMER
185 South State Street,
Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147

Attorneys for Gardner and Hernandez

IN THE UTAH SUPREME COURT

--oooOooo--

RICHARD W. RINGWOOD, Plaintiff, vs. FOREIGN AUTO WORKS, INC., HOWARD R. FRANCIS, MASSIMO C. POGGIO, REBECCA JANE POGGIO, ANTHONY HERNANDEZ and HUGH GARDNER, Defendants.	)	Case No. _____ From the Utah Court of Appeals' Opinion dated January 2, 1990 In Case Nos. 870540-CA 870541-CA & 870544-CA (Consolidated)
MASSIMO "MAX" POGGIO and FOREIGN AUTO WORKS, INC., Plaintiffs, vs. HUGH GARDNER and ANTHONY R. HERNANDEZ, Defendants.	)	

--oooOooo--

MASSIMO "MAX" POGGIO AND FOREIGN AUTO WORKS, INC., BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

Dallas H. Young, Jr.
IVIE & YOUNG
P.O. Box 672
48 North University Avenue
Provo, Utah 84601

Attorneys for Ringwood

Jeril B. Wilson
100 East Center, Suite 2100
Provo, Utah 84601

Attorney for Poggio and Foreign Auto Works, Inc.

Val R. Antczak
Julia c. Attwood
PARSONS, BEHLE & LATIMER
185 South State Street,
Suite 700
P.O. Box 11898
Salt Lake City, Utah 84148

Attorneys for Gardner and Hernandez

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

QUESTION PRESENTED FOR REVIEW

Whether the trial and appellate courts erred in holding appellants Gardner and Hernandez personally liable on the contract between Foreign Auto Works, Inc., Poggio and Dinero Services, Inc.

COURT OF APPEALS OPINION

This brief in opposition asks the court to deny review of the Utah Court of Appeals' Opinion (for publication) dated January 2, 1990.

JURISDICTIONAL GROUNDS

This Court has jurisdiction over this matter pursuant to Utah Code Ann. Sec. 78-2-2(3)(a) and Rule 42 of the Rules of the Utah Supreme Court. This brief in opposition has been timely filed under Rule 45 of the Rules of the Utah Supreme Court in that petitioner's Petition for Writ of Certiorari was filed February 28, 1990. Respondent made timely motion for an extension of time to answer on April 2, 1990.

STATEMENT OF THE CASE

For purposes of this petition respondent generally accepts the statement of the case given in petitioner's Petition for Writ of Certiorari.

STATEMENT OF FACTS

For purposes of this petition respondent generally accepts the statement of facts given in petitioner's Petition for Writ of Certiorari with the following additions.

1. On November 27, 1979, Gardner and Hernandez and Poggio

executed a written agreement in the office of attorney Jackson Howard in Provo, Utah. (Findings of Fact p. 5, no. 15, see Appendix B).

2. The December 29 agreement was executed by the same parties and in the same fashion as was the November 27th agreement. (Findings of Fact p. 7, no. 25, see Appendix B).

3. On February 8, 1980 a written agreement was executed between Dinero Services, Inc. by Anthony Hernandez as President and Foreign Auto Works, Inc. by Poggio as President and by Poggio. The agreement involved the same transaction as the previous two. (Findings of Fact, p. 9, no. 33, see Appendix B).

4. **Gardner and Hernandez ostensibly under the name of Dinero Services Inc., individually and on behalf of FAW executed a further agreement dated April 14, 1980, "the agreement of April."** The agreement of April 14 was prepared by counsel for Gardner and Hernandez. **The court finds that said agreement, as well as the agreement of February 8, 1980, were intended to be between Poggio, individually, and on behalf of FAW on the one hand and Gardner and Hernandez on the other: that Dinero Services Inc. was not considered by the parties as an operative entity as far as the dealings between the parties were concerned;** that the said agreement of April 14, 1980, was intended by the parties to supercede all previous agreements and dealings between Poggio and FAW on the one hand and Gardner and Hernandez on the other. This agreement was entered into between the parties because the February 8, 1980, agreement had technically been terminated by the non-

occurrence of a condition subsequent (transfer of the Mazda franchise by March 1, 1980), the representations of Mazda that the franchise would not be transferred to an entity which also operated the Fiat franchise, and because of continuing disagreement between the parties as to the value of the assets involved and the debts of FAW which had Bulk Sales implications. (Findings of Fact, p. 12, 13, no. 47, see Appendix B) (emphasis added).

5. Judge Cullen Y. Christensen's above finding was based upon the history of the transactions and the hearing of evidence as shown in petitioners Memorandum in Support of Defendant's Motion to Dismiss where they state: "These defendants have earlier argued to the Court that the proper defendant to an action on the April 14, 1980 agreement is Dinero Services. . . The Court has already ruled against these defendants on that issue, concluding that defendant Hernandez and Gardner are the real parties in interest. These defendants will not attempt to reargue that ruling." (Petitioners Memorandum in Support of Defendant's Motion to Dismiss, p. 2, see Appendix C, Exhibit 1).

Arguments

I. The Court of Appeals was correct in affirming the trial courts decision to hold Hernandez and Gardner personally liable on the April 14, 1980 agreement. Both parties had the opportunity to present, brief and argue their case in front of Judge Christensen prior to his ruling, consequently it cannot be said that the trial court abused it's discretion.

The trial court did not abuse it's discretion in the present case, consequently the appellate court could not have reversed the

decision in regards to Hernandez' and Gardner's claim.

> The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute it decision for that of the trial court. Shamblin v. Brattain, 749 P.2d 339, 341 (Cal. 1988).

The trial Judge heard numerous pretrial motions, and had close contact with the parties. He had more than sufficient information to make his ruling. As cited by the Appeals Court, Judge Christensen ruled at the beginning of trial

> that Gardner and Hernandez were personally liable under the April agreement and the trial proceeded with that ruling in place. The court found that Gardner and Hernandez were the real parties in interest, that they were intended as parties to the agreement, and that "Dinero Services Inc. was not considered by the parties as an operative entity as far as the dealings between the parties were concerned." (Utah Court of Appeals' Opinion (for publication) dated January 2, 1990, p.14, see Appendix A).

In affirming Judge Christensen's ruling the reviewing court correctly gave deference to the learned trial judge.

> In situations where the exercise of discretion is appropriate, considerable weight should be given to the determination of the trial court, whichever way it goes. This is true because due to his close involvement with the parties, the witnesses, and the total circumstances of the case, he is in the best position to judge what the interests of justice require in safeguarding the rights and interests of all parties concerned. Barber v. Calder, 522 P.2d 700, 702 (Utah 1974).

Petitioners claim that they had no opportunity to put on evidence to show that the April contract should not involve Hernandez and Gardner but only Dinero Services Inc. They argue that Judge Christensen's ruling prior to trial was unfair and an abuse of discretion. But Judge Christensen had close involvement

with the parties prior to trial and heard numerous pretrial motions. At the beginning of the trial he had heard enough in order to confidently rule that Hernandez and Gardner were the real parties involved in the contract. The fact that he had heard arguments and received evidence regarding the issue in question is evidenced throughout the record. In Petitioners own Memorandum in Support of Defendant's Motion to Dismiss petitioners state:

> **These defendants have earlier argued to the Court that the proper defendant to an action on the April 14, 1980 Agreement is Dinero Services.** Certainly, an action against Dinero Services, a new party, would not relate back to the original filing of this Complaint under Rule 15(c) of the Utah Rules of Civil Procedure. **The Court has already ruled against these defendants on that issue, concluding that defendant Hernandez and Gardner are the real parties in interest.** These defendants will not attempt to reargue that ruling. (Petitioners Memorandum in Support of Defendant's Motion to Dismiss, p. 2, see Appendix C, Exhibit 1, (emphasis added).

In a ruling previous to trial signed by Judge Christensen and dated September 2, 1986, Judge Christensen wrote:

> This matter comes before the Court, under Rule 2.8, on the motions of various parties seeking relief as hereinafter indicated. **The Court has reviewed the file, considered the memoranda of counsel, entertained argument of counsel, and upon being advised in the premises**, now makes the following ruling: . . . Said motion is denied as to Plaintiffs Poggio and Foreign Auto Works. **While it is conceded by Said Defendants Gardner and Hernandez that such Defendants were the actual parties to the agreement of April 14, 1980** the Court is of the opinion that a legitimate question of fact remains as to whether or not Plaintiff signed the April 14, 1980, agreement under duress. (Ruling, In the Fourth Judicial District Court Utah County, State of Utah, September 2, 1986, see Appendix C, Exhibit 2)(emphasis added).

Other pretrial memoranda suggests that Judge Christensen had dealt with the issue numerous times. In petitioners Memorandum in Support of Motion for Partial Summary Judgement dated June 27,1986

petitioners list as one of their uncontroverted facts.

> Although the named parties to the February Agreement were "Foreign Auto Works, Inc." and "Dinero Services, Inc.," the actual parties were in fact Poggio, Gardner and Hernandez, and Poggio testified that he believed that he was at all times dealing with the same party. (Memorandum in Support of Motion for Partial Summary Judgement, June 27, 1986, p.4, no. 9, see Appendix C, Exhibit 3).

In the same motion petitioners reaffirm the fact that the parties were dealing with each other as individuals and that the real parties were Poggio, Hernandez and Gardner.

> In this case, there are four separate agreements between the same parties, all of which deal exclusively with the sale and purchase of FAW. Each of the agreements executed subsequent to the November Agreement resulted directly from disputes between the parties, and constituted an effort to resolve those disagreements. (Memorandum in Support of Motion for Partial Summary Judgement, June 27, 1986, p.7,8, see Appendix C, Exhibit 3).

Finally in a memorandum filed in July 1986 **petitioners** again talk about all four of the agreements as being between the same parties.

> With respect to plaintiff's first argument, the evidence is uncontroverted that the individuals involved in all of the contracts were identical, and that all of them believed that they were dealing with the same parties at all times. (Reply Memorandum in Support of Motion for Partial Summary Judgment, July 18, 1986, p. 4, see Appendix C, Exhibit 4).

Judge Christensen heard arguments and received evidence on the matter many times before trial. Because he heard arguments prior to trial he was able to confidently begin the trial with a ruling on the matter. This allowed the court to save time by not rearguing an issue that had been argued and decided previous to trial. The procedure followed by Judge Christensen is not an abuse of discretion nor is it contrary to Rule 43, the basis upon which

petitioners rely for this court's jurisdiction to review. Judge Christensen's actions did not depart from the accepted and usual course of judicial proceedings and consequently do not call for the supervision of the Supreme Court. Both parties had an opportunity prior to trial to present, brief and argue their position. Petitioners cannot now assert that they had no opportunity to present evidence on the matter. There was no abuse of discretion.

II. Petitioners reliance upon rule 43(3), Rules of the Utah Supreme Court in order to invoke a review by this Court is unfounded. The Appeals Court enunciated the "Colman test" and listed reasons for its decision, consequently petition for certiorari should be denied.

Rule 43(3) reads as follows:

> Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the court's discretion, indicate the character of reasons that will be considered:
> (3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; (Rule 43, Rules of the Utah Supreme Court).

The decision by the Utah Appeals Court does not depart from the accepted and usual course of judicial proceedings. The Appeals Court reviewed the lower court decision, articulated the correct standard for determining whether to pierce the corporate veil and expressed reasons for affirming the trial courts decision in regards to Hernandez' and Gardner's claim.

The opinion handed down by the Court of Appeals devotes an

entire section to a discussion of whether the trial court was correct in piercing the corporate veil. The Appeals court cited the test set forth in Colman v. Colman, 743 P.2d 782 (Utah App. 1987). The court explained,

> In order to disregard the corporate entity, two circumstances must be shown: (1) such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but of one or a few individuals; and (2) if observed, the corporate from would sanction a fraud, promote injustice, or result in an inequity. (Opinion (for Publication), p.14, January 2, 1990, Utah Court of Appeals, citing Colman v. Colman at 786).

The Court of Appeals went on to say, "At the beginning of trial, the court stated that Gardner and Hernandez were personally liable under the April agreement and the trial proceeded with that ruling in place." (Opinion (for Publication), p.14, January 2, 1990, Utah Court of Appeals). The above statement reaffirms that the trial court obviously had heard enough evidence in pretrial motions to make the ruling, petitioners argue that the above quote is all the analysis used by the Appeals court to affirm the decision. What they neglect to point out is that the Appeals court went on to say,

> These findings are supported by the evidence, **especially considering the history of transactions in this matter,** and met the required legal criteria for piercing the corporate veil. Therefore, the court did not err in holding Gardner and Hernandez personally liable to Poggio under the April agreement. Id., (emphasis added).

The appeals court recognized as did the trial court that Poggio, Hernandez and Gardner were dealing with each other and not as corporate entities. The first two agreements were negotiated between Poggio, Hernandez and Gardner. The second two agreements

were negotiated between Poggio, Hernandez and Gardner. The only difference between the first two agreements and the second two agreements was that the name Dinero Services was typed on the agreements. As the Appeals Court explained, the trial court's findings were supported by evidence, showing that the history of the matter revealed that the parties dealt with each other as individuals throughout their negotiations.

Conclusion

This court should not grant certiorari in this matter. Both parties had the opportunity to present evidence, file briefs and argue their position in pretrial motions. Judge Christensen after considering the evidence, memorandums and arguments made his decision. The Appeals Court giving deference to the trial judge affirmed his decision.

This situation is not within the scope of Rule 43, Rules of the Utah Supreme Court. The Appeals Court has not "departed from the accepted and usual course of judicial proceedings" nor have they "sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision." (Rule 43, Rules of the Utah Supreme Court). The appeals court enunciated the standard for piercing the corporate veil and applying that standard stated that the history of the transactions coupled with other evidence relied upon by the trial court was enough to meet the test.

After hearing evidence Judge Christensen determined that,

Poggio, Hernandez and Gardner were dealing with each other individually and not as corporate entities. The Court of Appeals was correct in affirming this decision. Therefore, this court should deny petitioner's petition for writ of certiorari.

Dated this 16th day of April, 1990.

Lynn C. Harris and Jeril B. Wilson
Attorneys for Respondents
Poggio and FAW

Mailing Certificate

I hereby certify that I caused to be mailed, postage prepaid, four copies of the foregoing Massimo "Max" Poggio and Foreign Auto Works, Inc., Brief In Opposition To Petitioner's Writ of Certiorari to the following on this 16 day of April, 1990:

Dallas H. Young, Jr.
IVIE & YOUNG
P.O. Box 672
48 North University Avenue
Provo, Utah 84601

Attorneys for Ringwood

Val R. Antczak
Julia C. Attwood
PARSONS, BEHLE & LATIMER
185 South State, #700
Salt Lake City, UT 84111

Attorneys for Gardner and Hernandez

APPENDIX A

IN THE UTAH COURT OF APPEALS

----ooOoo----

Richard W. Ringwood, Plaintiff and Appellant, v. Foreign Auto Works, Inc. and Howard R. Francis, Massimo C. Poggio, Rebecca Jane Poggio, Anthony Hernandez and Hugh Gardner, Defendants and Respondents.	OPINION (For Publication) Case No. 870540-CA
Massimo "Max" Poggio and Foreign Auto Works, Inc., Plaintiffs, v. Hugh Gardner and Anthony R. Hernandez, Defendants.	
Richard W. Ringwood, Plaintiff and Respondent, v. Foreign Auto Works, Inc. et al., Defendants and Appellants.	Case No. 870541-CA
Massimo "Max" Poggio and Foreign Auto Works, Inc., Plaintiffs and Appellants, v. Hugh Gardner and Anthony R. Hernandez, Defendants and Respondents.	
Richard W. Ringwood, Plaintiff and Respondent, v. Foreign Auto Works, Inc. et al., Defendants and Respondents.	Case No. 870544-CA
Massimo "Max" Poggio and Foreign Auto Works, Inc., Plaintiffs and Respondents, v. Hugh Gardner and Anthony R. Hernandez, Defendants and Appellants.	

Fourth District, Utah County
The Honorable Cullen Y. Christensen

Attorneys: Dallas H. Young, Jr., Jerry Reynolds, Provo, for Appellant and Respondent Ringwood
Val R. Antczak, Julia C. Attwood, Salt Lake City, for Appellants and Respondents Gardner & Hernandez
Robert C. Fillerup, Orem, for Appellant and Respondent Francis
Lynn C. Harris, Jeril B. Wilson, Provo, for Appellants and Respondents Poggio and Foreign Auto Works

---

Before Judges Billings, Greenwood, and Orme.

GREENWOOD, Judge:

This appeal arises from the sale of Foreign Auto Works, Inc. (FAW), an auto sales and service business. Richard W. Ringwood (Ringwood), Howard R. Francis (Francis), and Rebecca Jane and Massimo "Max" Poggio (Poggio) were the owners of all the issued FAW stock. Ringwood agreed to sell his stock to Poggio and Francis. Poggio subsequently bought Francis's stock and sold FAW to Hugh Gardner (Gardner) and Anthony R. Hernandez (Hernandez). Ringwood brought an action against Francis and Poggio for breach of contract and against Hernandez and Gardner, claiming to be a third party beneficiary of their contract with Poggio. Poggio filed a separate action for breach of contract against Gardner and Hernandez. The two actions were consolidated and tried together. The court found Francis and Poggio liable for breach of their agreement with Ringwood, but dismissed Ringwood's claim against Hernandez and Gardner. The court also rendered judgment for Poggio against Gardner and Hernandez. Hernandez and Gardner's counterclaim against Poggio and FAW was dismissed with prejudice. All parties appealed.

FACTS

Ringwood, Francis, and Poggio were owners of all the FAW issued stock, 50,000 shares. FAW was engaged in operating

Mazda and Fiat franchises and selling parts for and repairing Mazdas and Fiats.

In October 1978, the owners negotiated a sale of Ringwood's 15,000 shares to Francis and Poggio. This agreement was formalized in a promissory note obligating FAW, Poggio, and Francis to pay Ringwood $100,000 at a rate of at least $20,000 per year with interest to accrue at 10.5% annually. On November 8, 1978, FAW, Ringwood, Francis, and Poggio executed a new agreement that included most of the same terms as in the promissory note, but also contained a merger provision. This agreement prohibited Francis and Poggio from selling the stock or assets of FAW without Ringwood's prior written approval. By October 1979, Francis and Poggio were delinquent in their payments to Ringwood. Poggio then purchased all of Francis's shares and became the sole owner.

On November 27, 1979, Poggio contracted to sell the FAW stock to Gardner and Hernandez. The same parties executed a new agreement on December 29, 1979, which excluded the sale of FAW's real property. Both agreements included provisions for full payment to Ringwood and specified 10.5% per annum interest on amounts to be paid to Poggio.

On February 8, 1980, a new agreement was again executed changing the transaction from a sale of FAW stock to a sale of FAW's assets. No interest rate on the purchase price was specified. Dinero Services, Inc., (Dinero) a corporation formed and owned by Hernandez and Gardner, was designated as the sole buyer. This agreement did not contain any provision for the buyer to assume Poggio's obligation to Ringwood.

In April 1980, Poggio and Dinero Services, Inc. executed their final agreement. This agreement was executed because a condition precedent in the February contract had not occurred and a dispute had arisen over the assets' value. It contained an indemnity agreement that required Poggio to indemnify the "seller" [sic] for any amounts Dinero might be required to pay Ringwood, including attorney fees. Again, no interest rate was set forth.

Ringwood had filed a prior lawsuit on January 29, 1980, claiming Poggio and Francis had breached the October 1978 promissory note. Because Ringwood did not base his claim on the November 8 agreement, which the court found controlling, the court dismissed Ringwood's claim with prejudice. This

decision was affirmed in Ringwood v. Foreign Auto Works, Inc., 671 P.2d 182 (Utah 1983).

Ringwood filed the complaint leading to this appeal on February 4, 1985, basing his claim against Poggio and Francis on the November 8 agreement. Ringwood included Gardner and Hernandez as defendants, claiming he was a third party beneficiary of their agreement with Poggio and that he was damaged by their breach of that agreement. Ringwood claimed Poggio and Francis failed to make payments required by the November agreement; that they breached the agreement by selling FAW's assets; and that they acted with malicious intent to deprive Ringwood of his interests.

Poggio then filed a complaint against Gardner and Hernandez for breach of their November 27, 1979 agreement. After the court found the April 1980 agreement was controlling, Poggio amended his complaint, basing his claims on the April agreement.

The court found that res judicata did not bar Ringwood and that Poggio and Francis were liable to Ringwood for breach, but that there was no malicious intent. The court also awarded Poggio judgment against Hernandez and Gardner personally, rather than against Dinero, with interest to accrue at the legal rate, finding that the controlling contract did not specify an interest rate. The court allocated expense and income damages from April 14, 1980, the date of the closing, instead of February, when Hernandez and Gardner took possession of FAW.

With respect to Ringwood's claims against Gardner and Hernandez, the court found Ringwood was not a third party beneficiary but only an incidental beneficiary under the controlling agreement, and dismissed the claim with prejudice. The trial court also found there was insufficient evidence to find that Poggio or FAW was insolvent when the contract with Hernandez and Gardner was entered into.

Ringwood appeals the court's finding that he is not a third party beneficiary. He argues further that the April 14 agreement could not release Gardner and Hernandez from their obligation to him.

Poggio appeals the court's ruling that Ringwood's claim was not barred by res judicata and that interest would accrue on his judgment against Gardner and Hernandez at the legal rate. Also, with respect to the court's finding on allocation of

income and expense damages, Poggio argues he should be liable for those damages only to February 8, 1980, when Gardner and Hernadez took control of FAW, not April 14, 1980, the closing date specified in the last agreement.

Gardner and Hernandez claim the court erred in finding that Poggio's amended complaint relates back to his original complaint, thus allowing Poggio to bring a claim six years after the initial breach on August 8, 1980, after expiration of the applicable statute of limitations.

The court denied Gardner and Hernandez attorney fees because there was no showing of the necessity or reasonableness of the fees requested. Gardner and Hernandez claim on appeal that a showing of reasonableness is unnecessary under an indemnity agreement.

RINGWOOD'S CLAIMS

Ringwood raises two arguments on appeal. First, he claims the court erred in finding he was not a third party beneficiary, but only an incidental beneficiary of the contract between Poggio and Gardner and Hernandez. Second, in related arguments, Ringwood urges that Poggio's release of Gardner and Hernandez from their obligation to pay him was ineffective because (1) he had vested rights by virtue of Gardner and Hernandez's exercise of control over FAW, (2) Poggio was insolvent at the time of the release, and (3) there was not fair consideration for the April agreement.

Third Party Beneficiary

The court found that Ringwood was an intended third party beneficiary under the first two contracts between Poggio and Gardner and Hernandez, but that Ringwood did not rely upon, assent to, nor file an action based on either of those contracts prior to the time they were superceded by the February and April 1980 agreements. The court further found that Ringwood was intended to be an incidental beneficiary only of the February 8, 1980 and April 14, 1980 agreements.

"Generally, the rights of a third-party beneficiary are determined by the intentions of the parties to the subject contract." Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314, 1315 (Utah 1982). Moreover, "[f]or a third-party beneficiary to have a right to enforce a right, the intention of the contracting parties to confer a separate and distinct

benefit upon the third party must be clear." Hansen v. Green River Group, 748 P.2d 1102, 1105 (Utah Ct. App. 1988) (quoting Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 506 (Utah 1980)). An incidental beneficiary is defined as a "person who will be benefited by the performance of a contract in which he is not a promisee, but whose relation to the contracting parties is such that the courts will not recognize any legal right in him." Schwinghammer v. Alexander, 21 Utah 2d 418, 446 P.2d 414, 415 (1968).

In this case, the contracts of November and December expressly obligated Gardner and Hernandez to assume Poggio's obligation to Ringwood. However, these agreements were superceded by the February agreement and ultimately by the April agreement, both of which lacked any requirement that Gardner and Hernandez assume the obligation to Ringwood, but explicitly obligated Poggio to satisfy the obligation. Because Gardner and Hernandez did not expressly assume the obligation as they had in the earlier agreements, and because Poggio expressly agreed to satisfy his obligation to Ringwood, it is clear that the parties no longer intended Ringwood as a third party beneficiary. Gardner and Hernandez have cited the Restatement (Second) of Contracts for the proposition that parties may modify duties to a third party beneficiary under some circumstances, as follows:

> (1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty so provides.
>
> (2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.
>
> (3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

Restatement (Second) of Contracts § 311 (1981) (emphasis added). Although no Utah cases have expressly adopted this language, we find it applicable to the facts of this case. As found by the trial court, Ringwood did not rely upon nor change his position because of the rights as a third party beneficiary afforded him in the first two contracts, nor did he file an action based on those rights. Therefore, the parties were free to terminate Ringwood's rights in the later, superceding contracts. The April agreement clearly does not give Ringwood third party beneficiary status. As a result, the trial court did not err in concluding Ringwood was not a third party beneficiary to the April agreement.

Fraudulent Release

Ringwood also argues that the rescission of his rights under the earlier agreements was fraudulent and, therefore, invalid, because Poggio did not receive fair consideration for the release and because Poggio was insolvent. To support his contention, Ringwood primarily relies on the Second Restatement on Contracts, which states, "a promise for the benefit of a creditor of the promisee is an asset of the promisee. A release of the promisor may be a fraud on the beneficiary or on other creditors of the promisee if the promisee is insolvent and the release is made without fair consideration . . . ." Restatement (Second) of Contracts § 311 comment i (1981).

The court's findings state that there was insufficient evidence to find that either Poggio or FAW was insolvent. The court also found that there was fair consideration for the April 1980 agreement. We review the trial court's findings in accordance with Utah R. Civ. P. 52(a), and will not reverse unless the findings are clearly erroneous.

Evidence was presented as to Poggio's debts, including tax debts and the amounts owed to Ringwood. However, no evidence was admitted concerning the value of FAW, retained by Poggio under the agreements, nor of the Fiat franchise, which he retained until 1982. Poggio also testified that he owned a painting, valued in excess of $100,000. No competent evidence was presented to invalidate that valuation. We find sufficient evidence to support the court's finding that Poggio's insolvency was not established. Similarly, the court's finding of fair consideration for the April 1980 agreement is supported by Poggio's testimony regarding amounts he was to receive under the agreement and as reflected in the agreement itself.

Finally, Ringwood cites Bracklein v. Realty Ins. Co., 95 Utah 490, 80 P.2d 471 (1938) to support his novel theory that he had a vested third party interest because of Gardner and Hernandez's exercise of dominion and control over FAW's assets. Bracklein, however, concerns a grantee of mortgaged property who was in privity of contract with the mortgagee through an assumption clause. Ringwood was not in privity with Gardner and Hernandez and, therefore, Bracklein is inapplicable. Also, Gardner and Hernandez took possession of FAW after the February agreement was executed and after Ringwood's third party beneficiary rights had been extinguished. Therefore, Ringwood is not restored to third party rights by use of this theory.

POGGIO'S CLAIMS

On appeal, Poggio claims that the trial court erred (1) by concluding that Ringwood's claims against him under the November 1978 agreement were not barred by res judicata; (2) in ruling that the legal rate of interest applied to the amount owed him by Gardner and Hernandez; and (3) allocating costs and expenses from the date of closing rather than from when Gardner and Hernandez took over FAW.

Res Judicata

Poggio claims the court incorrectly concluded that the doctrine of res judicata did not operate to preclude Ringwood's second complaint against him. Prior to analyzing the applicability of res judicata, however, we consider an evidentiary question raised by Ringwood. Ringwood asserts that there was no evidentiary basis for a determination that res judicata barred his action, because no evidence was offered or admitted as to the prior proceeding. We have examined the record, and determined that there are no exhibits in the trial court proceedings consisting of records of the prior litigation, nor were any requests for judicial notice of those proceedings made on the record.

Ringwood cites the case of Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975) as supporting his position. In Parrish, defendant claimed that plaintiff's action was barred by res judicata because a prior similar action had been dismissed. The trial court's grant of summary judgment to defendant was reversed by the Utah Supreme Court, stating that "[a] survey of the record reveals that defendant never submitted a copy of the pleadings and judgment" from the prior

action. Id. at 1087. The court found that "[s]ince the record of the prior action was not before the trial court, there is no basis to sustain the determination that plaintiff's claim was barred by the doctrine of res judicata." Id.

Application of Parrish was addressed by this court in Trimble Real Estate v. Monte Vista Ranch, 758 P.2d 451 (Utah Ct. App. 1988), cert. denied, 769 P.2d 819 (Utah 1988). In a prior action, Trimble had sued Fitzgerald, a buyer, for a real estate commission. The trial court found against him and the supreme court affirmed the decision. Trimble then brought a second action for the same commission against Monte Vista Ranch, seller of the property, which raised the defense of res judicata. The trial court dismissed the action on the basis of res judicata and Trimble appealed. On appeal, Trimble, relying on Parrish, asked for reversal because the trial court did not have before it the records of the prior proceeding, but only the supreme court decision, which was attached to a memorandum in support of defendant's motion for summary judgment. The Trimble court found Parrish distinguishable, noting that in Parrish, the trial court had no record at all of the prior proceeding, and thus "had absolutely no basis for determining the res judicata issue." Id. at 455. The court further found that Trimble had consented to the trial court's reliance on the opinion and that

> once Monte Vista submitted to the district court a copy of the Supreme Court opinion, which on its face showed that the key issue had been litigated and decided, the burden shifted to Trimble, if it believed more than the opinion was needed to make a fully informed decision, to produce the record of the prior proceeding, urge the court to take judicial notice of it, or otherwise show that the opinion should not be taken at face value.

Id. Trimble, however, had not taken any of those actions but had merely argued the meaning of the opinion in the prior action. Id. As a result, this court held that Trimble consented to the trial court's use of the opinion alone as a basis for its ruling. In addition, the trial court was able to infer from the opinion what had been adjudicated in the prior action and conclude that the present action was barred by collateral estoppel. Id.

In this case, from our reading of the record, it is not clear whether or not the trial court actually examined the trial court proceedings in the former action.[1] It is clear, however, that the trial court examined the supreme court opinion. Not only was it referred to in some detail in memoranda and motions of counsel, but was also detailed in the court's rulings, which demonstrate the court's familiarity with the opinion. Throughout the course of the trial court proceedings, counsel and the court referred to and argued the meaning of the supreme court opinion in the context of the res judicata claim. At no point did Ringwood object to reliance on the opinion or move for admission of the former action's trial court proceedings. Therefore, as in Trimble, there was no error in utilizing the opinion only to determine the applicability of res judicata.

The next question is whether there needed to be explicit admission of the opinion into evidence or taking of judicial notice.[2] Judicial notice serves as a substitute for the taking of evidence. 29 Am. Jur.2d Evidence § 14 (1967). Therefore, since the opinion was not admitted into evidence, it is sufficient if judicial notice was taken. Pursuant to Utah R. Evid. 201(c), the court has discretion to take judicial notice without request by counsel. In this case, the trial court reserved ruling on the res judicata issue until after the supreme court opinion was issued. Thereafter, it referred to the opinion in detail when rendering its decision and the findings of fact and conclusions of law entered include particulars from the opinion. It is clear that the trial court had carefully read the opinion and ruled on the res judicata issue on the basis of its interpretation of the opinion, with no objection by the parties. We, therefore, conclude that the court took judicial notice of the opinion and utilized the

---

1. There are, however, indications that the court may have examined the proceedings. For example, the court said it wanted to look at the file of the former action when the supreme court was through with it, and at one point, counsel for Poggio stated he had the summons and complaint from the former action.

2. Trimble does not address this question, although it appears that the supreme court opinion was neither admitted as evidence nor afforded official judicial notice on the record.

opinion as the evidentiary basis for its decision on the issue of res judicata.[3]

We now turn to the question of whether the trial court correctly concluded that Ringwood's claim under the November 8 agreement against Poggio was not barred by res judicata. Claim preclusion is a branch of the doctrine of res judicata which has three requirements for its application:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Madsen v. Borthwick, 769 P.2d 245, 247 (Utah 1988). Therefore, the result in the prior action constitutes the full relief available to the parties on the same claim or cause of action. Trimble, 758 P.2d at 453. In contrast to the claim preclusion branch of res judicata, issue preclusion, or collateral estoppel, requires that the issue in question was competently, fully, and fairly litigated in the earlier action. Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 389 (Utah Ct. App. 1987). Claim preclusion applicability, however, requires that the claim, even though not decided in the prior action, could and should have been litigated, but was not raised by any of the parties. See Bradshaw v. Kershaw, 627 P.2d 528 (Utah 1981). This "reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so." Restatement (Second) of Judgments § 24 comment a (1982).

The findings of the trial court in this case indicate that, in the prior action, the trial court ruled that the October promissory note merged into the November 8 agreement and that ruling was affirmed by the Utah Supreme Court. The trial court herein concluded that the prior decision was "not a decision on

---

3. We note, however, as does Trimble, that it would be preferable for counsel to have provided a copy of the trial court proceedings and the supreme court opinion, and either had them admitted as exhibits or requested judicial notice.

the merits of Ringwood's claims for the sale of his stock and such decision is not res judicata so as to preclude Ringwood from pursuing claims under the Agreement of November 8, 1979." We do not defer to the trial court's conclusions of law, and in this case, find that the court erred in concluding that res judicata did not bar Ringwood's claim against Poggio. Both the October promissory note and the November agreement concerned Poggio's purchase of Ringwood's stock.[4] The court in the prior action determined that the October note was nullified by merger into the November agreement so that Ringwood could not assert a claim under the October note. Since Ringwood failed to assert a claim under the November agreement either initially or by amendment to his complaint, the case was properly dismissed. Obviously, a claim by Ringwood under the November agreement could have been decided in the prior action, as the agreement was extant and was in default. The only reason it was not decided was because Ringwood failed to raise the claim. The trial court apparently held that res judicata did not apply because Ringwood's claim for payment for his stock under the November agreement was not litigated. However, the reason the claim was not litigated was solely because of Ringwood's failure to assert the claim. The other requirements of res judicata are also met, as the parties are the same and the first action resulted in a final judgment on the merits.[5] Therefore, we find that res judicata bars Ringwood's claims against Poggio and Francis, and reverse the judgment granted Ringwood.

Legal Rate of Interest

Poggio appeals the court's application of the then legal rate of interest, 6%, to the balance of the purchase price owed by Gardner and Hernandez. Poggio admits that the April agreement is silent on the interest rate, but contends,

---

4. The supreme court opinion states: "In 1978, Mr. Ringwood and FAW agreed with the defendants, Mr. and Mrs. Poggio and Mr. Francis, that the defendants would purchase Ringwood's shares for $100,000, and the defendants signed a promissory note in October, 1978 for that amount. Subsequently, on November 8, 1978 the parties entered into a written agreement for the sale and purchase of the stock." Ringwood v. Foreign Auto Works, Inc., 671 P.2d 182, 182 (Utah 1983).

5. The fact that the prior action was dismissed with prejudice does not nullify res judicata application, as such constitutes litigation on the merits. Utah R. Civ. P. 52(a); Steiner v. State, 27 Utah 2d 284, 495 P.2d 809 (1972).

however, the interest rate should be inferred to be 10.5% as was specified in the previous agreements that were superceded.

Poggio presented no evidence at trial of an intent to incorporate a 10.5% interest rate into the April agreement. The court found that the parties intended the April agreement to supercede and replace all prior agreements. We defer to the trial court's findings as to the parties' intentions. Seashores Inc. v. Hancey, 738 P.2d 645, 647 (Utah Ct. App. 1987). The court's finding is supported by substantial evidence. Furthermore, the prior agreements merged into the April agreement which clearly does not specify an interest rate. Utah law provides that the legal rate is applicable in instances where the parties have not agreed on a specified rate. Utah Code Ann. § 15-1-1 (1986). We, therefore, conclude that the court did not err in awarding interest at the legal rate on Poggio's judgment against Gardner and Hernandez.

Allocation of Income and Expense Liability

Lastly, Poggio appeals the trial court's allocation of income and expense damages as of the date of closing rather than the earlier date when Gardner and Hernandez took possession of FAW. This issue was not raised in the trial court and, hence, cannot be considered for the first time on appeal. Burgers v. Maiben, 652 P.2d 1320, 1322-23 (Utah 1982); James v. Preston, 746 P.2d 799, 801 (Utah Ct. App. 1987).

GARDNER AND HERNANDEZ'S CLAIMS

Gardner and Hernandez contend the trial court erred (1) by finding them personally liable under the April agreement; (2) in ruling that Poggio's amended complaint related back to his original complaint; (3) in its calculation of the amount owed by them to Poggio; and (4) in denying them attorney fees.

Personal Liability

Gardner and Hernandez appeal the trial court's conclusion that they are personally liable under the April agreement. They argue that the court ignored the corporate form without finding Dinero was their alter ego and, consequently, unjustifiably pierced the corporate veil.

The corporate form protects shareholders from personal liability and will be pierced by the courts with great reluctance and caution. Colman v. Colman, 743 P.2d 782, 786

(Utah Ct. App. 1987). In order to disregard the corporate entity,

> two circumstances must be shown: (1) such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter-ego of one or a few individuals; and (2) if observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity.

Id. See also Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 46 (Utah Ct. App. 1988). One of the factors deemed significant in determining whether this test has been met is the use of the corporation as a facade for operations of the dominant stockholder. Colman, 743 P.2d at 786. "At the beginning of trial, the court stated that Gardner and Hernandez were personally liable under the April agreement and the trial proceeded with that ruling in place." The court found that Gardner and Hernandez were the real parties in interest, that they were intended as parties to the agreement, and that "Dinero Services Inc. was not considered by the parties as an operative entity as far as the dealings between the parties were concerned." These findings are supported by the evidence, especially considering the history of transactions in this matter, and meet the required legal criteria for piercing the corporate veil. Therefore, the court did not err in holding Gardner and Hernandez personally liable to Poggio under the April agreement.

Relation Back

Gardner and Hernandez appeal the court's conclusion that Poggio's amendment to the complaint, filed on October 16, 1986, relates back to his original complaint, filed on May 3, 1982, and was, thus, not barred by the statute of limitations. Poggio's last amended complaint was for the purpose of basing his claim against Gardner and Hernandez on the April agreement. Gardner and Hernandez argue that the earlier pleadings did not place them on notice that Poggio would base his action for breach of contract on the April agreement.

Under Utah R. Civ. P. 15(a), leave to amend pleadings "shall be freely given when justice so requires." Utah R. Civ. P. 15(c) states, "[w]henever the claim or defense asserted in

the amended pleading arose out of the conduct, transaction, or occurrence, set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Relation back is allowed under the rules even if a statute of limitations has run during the intervening time. Meyers v. Interwest Corp., 632 P.2d 879 (Utah 1981). In considering motions to amend pleadings, primary considerations are whether parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage. Lewis v. Moultree, 627 P.2d 94, 98 (Utah 1981). See also Vina v. Jefferson Ins. Co., 761 P.2d 581, 587 (Utah Ct. App. 1988).

In this case, Poggio's claim in his amended complaint is based on essentially the same transaction as was the original complaint: the purchase of FAW and/or its assets by Gardner and Hernandez and their alleged failure to perform under the operative contract between the parties. In addition, Gardner and Hernandez asserted repeatedly in the trial court proceedings, that the agreements under which Poggio had previously sought to recover had been superceded and filed a memorandum in support of a motion for partial summary judgment against Poggio, arguing the April agreement was controlling. This memorandum was filed three months before Poggio filed his amendment. Because the amendment was based on a similar claim arising out of the same general transaction, and because Gardner and Hernandez were aware, within the period of the statute, that the April agreement was superceding, Gardner and Hernandez had adequate notice of the claim and were not prejudiced by the amendment. The subject matter of the April agreement arose from the same basic dealings as the prior agreements between the same parties and the amendment alleging breach of the April agreement related back to the original filing and was not barred by the statute of limitations. Therefore, the court did not err in concluding that the amendment related back.

Amount of Liability to Poggio

Gardner and Hernandez claim the court erred in determining the amount owed Poggio. Specifically, they claim the court erred in calculating the amount they actually paid under the April agreement. Gardner testified that he actually overpaid approximately $12,000. To the contrary, Poggio testified that there was still an outstanding balance. Based on this testimony and other evidence, the court granted judgment to

Poggio for $20,330.27, as the balance owed on the purchase price.

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ." Utah R. Civ. P. 52(a). Particularly, the court's award of damages will be affirmed on appeal, "if there is a reasonable basis in evidence" to support it. Holman v. Sorenson, 556 P.2d 499, 500 (Utah 1976); Gillmor v. Gillmor, 745 P.2d 461, 462 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1278 (Utah 1988); Katzenbach v. State, 735 P.2d 405, 409 (Utah Ct. App. 1987). Moreover, "[t]he trial court as a trier of fact is free to assess the credibility of the witnesses, and a conflict in evidence alone is not grounds for reversal. We will not upset findings, so long as they are supported by substantial record evidence." Chandler v. Mathews, 734 P.2d 907, 909 (Utah 1987). Although evidence of the amount actually paid was conflicting, the trial court's finding is based on substantial evidence and is not clearly erroneous.

Attorney Fees

Finally, Gardner and Hernandez appeal the court's denial of attorney fees. The April agreement provided that Poggio would indemnify Dinero "from any and all claims and loss . . . including attoneys' fees" arising from claims made by Ringwood. Gardner's testimony that $6500 in attorney fees had been paid to defend against Ringwood's claims was the sole evidence offered to support the claim for attorney fees. The trial court denied the request for fees on the basis that there was no evidence presented to show that the fees were reasonable or necessary, or the nature of the work done. Gardner and Hernandez argue such evidence is unnecessary because the request is made pursuant to an indemnity agreement and not an attorney fees clause. To support this argument, they cite Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059 (Alaska 1978). However, in Heritage, the Alaska Supreme Court found attorney fees were recoverable as falling within an implied right of indemnification clause, but did not hold that there was no requirement of a showing that the fees were reasonable. We see no basis for distinguishing a request for attorney fees under an indemnity provision from a request under an attorney fee provision. "Attorney fees awarded pursuant to contract or statute are usually those found by the court to be 'reasonable,' unless the statute or contract provides otherwise." Canyon Country Store v. Bracey, 781 P.2d 414, 420 (Utah 1989). Furthermore, "[i]t is well established that to justify a finding of a reasonable attorney's fee, there must be

evidence in support of that finding. . . . It is beyond dispute that an evidentiary basis is a fundamental requirement for establishing an award of attorney fees." Barnes v. Wood, 750 P.2d 1226, 1233 (Utah Ct. App. 1988) (quoting Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1287 (Utah 1982)). The trial court was, therefore, correct in denying the request because there was no showing the fees requested were reasonable.

Affirmed in part, and reversed as to the judgment entered in favor of Ringwood against Poggio.

Pamela T. Greenwood, Judge

WE CONCUR:

Judith M. Billings, Judge

Gregory K. Orme, Judge

CASE TITLE:

Richard W. Ringwood,
Plaintiff and Appellant,
v.
Foreign Auto Works, Inc. and Howard R. Francis, Massimo C. Poggio, Rebecca Jane Poggio, Anthony Hernandez and Hugh Gardner,
Defendants and Respondents,

No. 870540-CA

Massimo "Max" Poggio and Foreign Auto Works, Inc.
Plaintiffs,
v.
Hugh Gardner and Anthony R. Hernandez
Defendants.

Richard W. Ringwood,
Plaintiff and Respondent,
v.
Foreign Auto Works, Inc. et al.,
Defendants and Appellants.

No. 870541-CA

Massimo "Max" Poggio and Foreign Auto Works, Inc.
Plaintiffs and Appellants,
v.
Hugh Gardner and Anthony R. Hernandez
Defendants and Respondents.

Richard W. Ringwood,
Plaintiff and Respondent,
v.
Foreign Auto Works, Inc. et al.,
Defendants and Respondents.

No. 870544-CA

Massimo "Max" Poggio and Foreign Auto Works, Inc.
Plaintiffs and Respondents,
v.
Hugh Gardner and Anthony R. Hernandez
Defendants and Appellants.

PARTIES:

Dallas H. Young, Jr.
Jerry Reynolds (Argued)
Ivie & Young
Attorneys for Appellant, Ringwood
P. O. Box 672
48 North University Avenue
Provo, Utah 84601

Val R. Antczak
Julia C. Attwood (Argued)
Parsons, Behle & Latimer
Attorneys for Defendants, Gardner & Hernandez
185 South State, Suite 700
P. O. Box 11898
Salt Lake City, Utah 84147-0898

Robert C. Fillerup (Argued)
Attorney for Appellant, Francis
1103 South Orem Boulevard
Orem, UT 84058

Lynn C. Harris
Attorney at Law
Jeril B. Wilson (Argued)
Harris & Carter
Attorneys for Respondents, Poggio and Foreign Auto
3325 North University, #200
Provo, UT 84064

TRIAL JUDGE:

Honorable Cullen Y. Christensen

January 2, 1990. OPINION (For Publication)

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed in part, and reversed in part, in accordance with the views expressed in the opinion filed herein.

Opinion of the Court by PAMELA T. GREENWOOD, Judge; JUDITH M. BILLINGS, and GREGORY K. ORME, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of January, 1990, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.

Deputy Clerk

TRIAL COURT:

Fourth District Court, Utah County, #60654

APPENDIX B

6.2, B5

DALLAS H. YOUNG, JR.
IVIE & YOUNG
Attorneys for Plaintiff Ringwood
P. O. Box 672
48 North University Avenue
Provo, Utah 84601
Telephone: 375-3000

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH

RICHARD W. RINGWOOD, Plaintiff, vs. FOREIGN AUTO WORKS, INC., at al., Defendants.	)	Civil No. 60,654 FINDINGS OF FACT AND CONCLUSIONS OF LAW
MASSIMO "MAX" POGGIO and FOREIGN AUTO WORKS, INC., Plaintiffs, vs. HUGH GARDNER and ANTHONY R. HERNANDEZ, Defendants.	)	Civil No. 65,314

1. On November 8, 1978 Richard W. Ringwood (Ringwood), Howard R. Francis (Francis), and Massimo "Max" Poggio (Poggio) were the owners of all of the stock, 50,000 shares, of a Utah corporation known as Foreign Auto Works (FAW).

2. FAW operated businesses at two different locations. One business was located at 235 West 300 South in Provo and one was located at 130 South State Street in Orem. The activity at 235 West 300 South consisted principally of repairing automobiles and

selling parts for automobiles manufactured out of the United States. FAW owned two retail automobile franchises. The franchises authorized FAW to sell and service new Mazda and Fiat automobiles. The Mazda and Fiat retail businesses were located in Orem at 136 South State Street.

3. On November 8, 1978 FAW, Ringwood, Francis, and Poggio executed a written agreement, ("the November 8 agreement"). That written agreement is included as part of the plaintiff's Exhibit 3 and is incorporated by reference in these Findings of Fact.

4. On November 8, 1978, Ringwood owned 15,000 shares of stock in FAW. Poggio and Francis owned the remaining 35,000 shares. FAW, by the terms of the November 8 agreement, agreed to purchase Ringwood's shares and pay him $100,000.00 for his 15,000 shares. Francis and Poggio and Poggio's wife Rebecca Jane Poggio, each personally guaranteed the performance of FAW. The purchase price was to be paid as follows:

> (3). Buyer agrees to pay monthly the sum of $1,000.00 to be applied toward the principal plus such additional sums representing monthly accrued interest. The monthly payments to be applied toward principal during any twelve month period shall total not less than $20,000.00, and therefore, Buyer agrees to pay such additional sums necessary to reduce the principal of the face amount of this note by $20,000.00 per each twelve month period from October 1, 1978.

5. Paragraph 7 of the November 8 agreement reads as follows:

> Buyer and buyer's shareholders, directors and officers agree that during the period for which an outstanding balance of the purchase price remains, they shall not dispose of, transfer, or encumber any of such shares of stock without the prior written approval of the seller, nor they shall, [sic] during this period, vote for any of the following without the prior written approval of the

seller:

> Recapitalization, reorganization, merger, or dissolution of the corporation, or the sale, exchange, or mortgage of any property or franchises of the corporation, except as to transactions in the regular course of the business of the corporation; or the amendment of the certificate of incorporation with respect to the rights of the shareholders.

6. The note referred to by paragraph (3) of the November 8 agreement was a promissory note dated October 1, 1978, which promissory note was the subject of Civil Action No. 53,579 in the above entitled court.

7. The October 1, 1978 promissory note was one by the terms of which Francis and Poggio agreed to pay the sum of $100,000 to the order of Ringwood. Payments were to be in the amount of $1,000 per month, interest at the rate of 10-1/2% and principal was to be reduced in at least the amount of $20,000 per year.

8. This court, Judge Allen B. Sorensen presiding, found in Civil No. 53,579 in Findings of Fact and Judgment dated the 8th day of March, 1982, that the promissory note of October 1, 1978 was merged into the November 8 agreement. In that case the court determined that the parties to the agreement of November 8, 1979 were Poggio, Francis and Ringwood rather than FAW and Ringwood. That decision was appealed to the Supreme Court of the State of Utah and was affirmed in the case of Richard W. Ringwood v. Foreign Auto Works, Massimo C. Poggio, et al., 671 P. 2d 182, (Utah 1983).

9. In 1978 Gardner approached Poggio inquiring concerning the possible purchase by Gardner of the Mazda franchise. Poggio expressed a lack of interest in 1978 in selling the Mazda franchise.

10. In September of 1979 Gardner again approached Poggio concerning the possible purchase of the Mazda franchise. At that time Gardner inquired concerning the purchase of the Fiat franchise as well.

11. On or about October 29, 1979, Gardner and Poggio signed a "Letter of Intent", plaintiff's Exhibit 1. The body of plaintiff's Exhibit No. 1 reads as follows:

> By this letter, We Dinero Service Leasing hereby intend to purchase the below stated Dealership located in Orem, Utah, known as, State Mazda & Fiat, from Mr. Max Poggio who intends to sell the above dealership for the dollar amount of $375,000.00. Terms of 10% down and 10-1/2% per annum for 10 years unless sooner paid. Mr. Poggio will deliver unincumbered stock in the above named corporation with all debts paid at the time of purchase, or Dinero Service Leasing will buy the assetts [sic] of the corporation at the time of the final purchase.

12. Either on October 29, 1979 or between October 29, 1979 and November 10, 1979, Poggio informed Gardner of his contract with Ringwood and that Poggio was delinquent in making the required payments to Ringwood on the November 8, 1979 agreement.

13. On November 10, 1979, Gardner delivered a check drawn on the Hugh Gardner or Tony R. Hernandez Partnership Account at United Bank at Murray, Utah, in the amount of $10,000.00 payable to Poggio. Gardner understood that the $10,000 evidenced by plaintiff's Exhibit No. 2 was to be used by Poggio to bring current the payments owed Ringwood under the November 8 agreement.

14. Sometime in 1979 prior to November 27, Poggio agreed with Howard R. Francis to, and did, purchase from Francis the stock which Francis owned in Foreign Auto Works on November 8, 1978, including Francis's rights in the stock being purchased

from Ringwood.

15. On or about November 27, 1979, Gardner and Hernandez and Poggio executed a written agreement in the office of attorney Jackson Howard in Provo, Utah. The November 27 agreement was received into evidence as part of plaintiff's Exhibit 3. The November 27 agreement was executed by Massimo Poggio as Seller, by Gardner and Hernandez as Buyers. It was also signed by FAW by Poggio, the president of FAW.

16. Gardner and Hernandez were represented in the drafting of the agreement of November 27, 1979 by attorney Paul Cotro-Manes of Salt Lake City. Poggio was represented by attorney Jackson Howard of Provo. On November 27, 1979 Poggio and Gardner and Hernandez and their respective attorneys knew of the November 8 agreement and knew its terms.

17. The November 27 agreement reads in part as follows:

> 4. Assumption of Debt. There is attached hereto and made a part hereof as Exhibit "A" the following documents:
>
> 1. A stock retirement agreement between Ringwood and Foreign Auto Works, Inc.
>
> 2. A promissory note signed by FAW and guaranteed by Max Poggio, Rebecca Jane Poggio and Howard R. Francis.
>
> 3. An escrow agreement.
>
> While the principal obligation to Ringwood is under the Stock Retirement Agreement, there has been executed as security for that obligation the promissory note. BUYERS shall assume the promissory note personally, pay it according to its terms, and hold Poggio and Francis harmless from any liability thereunder.

18. The third sentence of paragraph 11 of the November 27 agreement reads as follows:

BUYERS shall cause Foreign Auto Works, Inc., by separate agreement, attached hereto as Exhibit "F", to lease back the said premises to Max Poggio, together with all parts, supplies and equipment therein contained, and together with the Beck-Arnley Distributorship for the sum of $10.00 per year, until such time as the obligation of Foreign Auto Works to Ringwood is ended by final payment.

19. Paragraph 13 of the November 27 agreement provided as follows:

13. Warranty of SELLER.

a. Poggio will cause FAW to pay all its obligations except those owing Ringwood and except contingent obligations under flooring contracts, . . .

20. Paragraph 14 of the November 27 agreement reads as follows:

14. Franchises. The continued existence of the two new automobile dealer franchises now owned by FAW from the Mazda Motors Pacific and Fiat Motors of North America, Inc., are the prime consideration under which Buyers are taking this option to acquire all of the stock of FAW. In the event that either or both Hernandez-Gardner (Buyers) should not, at the inception of this agreement, be acceptable to either Mazda or Fiat as either franchisees, in their own right, or as the principal and controlling persons of FAW, then in that event this agreement shall become null and void and any and all considerations paid by Buyers to Seller as either the initial purchase price or as monthly installments including non-competition payments, shall become immediately repayable by Seller to Buyers, and Buyers shall forthwith cause their resignations as corporate officers and directors of FAW to be submitted to the corporation, and shall also, forthwith deed back to Seller the real property described in Exhibit "B" hereto, and Seller shall cancel the trust deed given by the Buyers and the underlying promissory note thereto. This provision shall not apply to a later rejection of Buyers by Mazda or Fiat.

21. The November 27 agreement provided that the Buyers would commence making payments on the purchase price on the first day of December, 1979. The agreement did not provide a date on which the buyers would take possession of the Foreign Auto Works'

assets.

22. The buyers, Hernandez and Gardner, did not take possession of FAW assets in the days following the execution of the November 27 agreement, neither did they make any of the installment payments provided for by that agreement.

23. On or about December 10, 1979 Foreign Auto Works issued a check payable to Anthony R. Hernandez in the sum of $10,000 for the purpose of refunding to Hernandez and Gardner the $10,000 which Poggio received from Gardner on November 10. Following the delivery of the check from Poggio to Hernandez, Poggio consulted with his attorney, Jackson Howard, and Poggio subsequently stopped payment of said check.

24. Following December 10, 1979 a meeting was had at the office of Jackson Howard among Poggio, Mr. Howard, Hernandez, Gardner, and Gardner and Hernandez's then attorney, Robert Reeder. Prior to the meeting, Poggio had disclosed to Mr. Howard that Gardner and Hernandez did not desire to purchase the real property which the November 27 agreement required them to do. As a result of the negotiations among Hernandez, Gardner, and Poggio and their attorneys, Howard and Reeder, another agreement, ("the December 29 agreement"), was prepared and executed on December 29, 1979.

25. The December 29 agreement was executed by the same parties and in the same fashion as was the November 27 agreement and the purchase price was $187,931.78 plus interest payable over time.

26. Paragraph 4 of the December 29 agreement was identical to paragraph 4 of the November 27 agreement. Paragraph 10 of the December 29 agreement was nearly identical to paragraph 11 of the November 27 agreement.

27. The third sentence of paragraph 10 of the December 29 agreement reads as follows:

> BUYERS shall cause Foreign Auto Works, Inc., by separate agreement, attached hereto as Exhibit "F", to lease back the said premises to Max Poggio, together with all parts, supplies and equipment therein contained, and together with the Beck-Arnley Distributorship, until such time as the obligation of Foreign Auto Works to Ringwood is ended by final payment.

28. Paragraph 12(a) of the December 29 agreement reads as follows:

> 12. Warranty of SELLER.
>
> a. Poggio will cause FAW to pay all its obligations except those owing Ringwood and except contingent obligations under flooring contracts, and except installment conditional sales agreements or installment equipment purchased as listed in Schedule G. . . .

29. Paragraph 15 of the December 29 agreement provided that Poggio would deliver the corporate books and records to Gardner and Hernandez upon the execution of the agreement. The December 29 agreement contained no other provision with respect to the delivery of the possession of the FAW assets to the buyers.

30. Following the execution of the December 29 agreement Gardner and Hernandez caused one of their employees to be present on a full time basis at the FAW place of business at 130 South State Street in Orem.

31. The December 29 agreement provided that payments

should commence being made on the contract on the 3rd day of January, 1980. Payments were allocated by the contract to the purchase price for the assets and to a covenant on the part of Poggio not to compete.

32. The installment payments required to be made by the December 29 agreement were not paid.

33. On or about February 8, 1980, a written agreement ("the February 8 agreement") was executed by Dinero Services, Inc. by Anthony Hernandez as President and Foreign Auto Works, Inc. by Poggio as President and by Poggio. The February 8 agreement was received into evidence as Exhibit 5. The major assets being purchased were the Mazda and Fiat franchises, parts, and inventory. The purchase price to be paid by the buyer was $175,000.00; $95,000.00 of which was to be paid on or before closing, with the remaining $80,000.00 to be paid under a promissory note over approximately four years. This agreement was entered into for a number of reasons, including ongoing disputes as to the values of assets and the need of the seller for additional monies at or near the time of closing, as opposed to receiving payments over a longer period of time.

34. The February agreement contained no reference to the November or December agreements.

35. The February 8 agreement was prepared by counsel for Gardner and Hernandez.

36. The February 8 agreement provided for the purchase of certain of the assets of FAW rather than for the purchase of

stock as the November 27, 1979 and December 29, 1979 agreements had done. The assets to be purchased are described in paragraph 2 of the February 8 agreement as follows:

> 2. Assets to be Acquired: The property described in Exhibit "A" shall include:
>
> a. All new current Mazda parts in possession of SELLER on Feb. 8/1980.
>
> b. All new current Fiat parts in possession of SELLER on Feb. 8/1980.
>
> c. All used automobiles owned by SELLER and present on the premises upon Feb. 8/1980 at 130 So. State, Orem, Utah 84057.
>
> d. SELLER's interest in the leasehold in that certain lease attached hereto as Exhibit "B";
>
> e. All reserves from contracts presently held by any bank or any other party.
>
> f. All furniture, fixtures, equipment and signs in possession of SELLER at Feb. 8/1980.
>
> g. In addition to the foregoing assets to be sold, SELLER and each of the principal shareholders of SELLER agree not to compete with the BUYER in the sale of Mazda or Fiat automobiles as more fully set forth hereinafter.

37. The February 8 agreement made reference to the obligation owed by Francis, Poggio, and PAW to Ringwood. Paragraph 3 E of the February 8 agreement reads as follows:

> Buyers will assume cost of defense in the event of any harassments by Richard Ringwood.

38. Under paragraph 4 of the February 8 agreement entitled "Representations of Seller", paragraph (b) provided as follows:

> "SELLER and its shareholders and directors have taken all necessary steps and obtained all necessary approvals for the sale of the property contemplated by this Agreement with the exception Richard Ringwood contract;".

39. Paragraph 4(c) of the February 8 agreement reads as follows:

> c. SELLER owns all of the property described in Exhibit "A" hereto free and clear of all liens, security interest, including taxes and all other encumbrances, and SELLER has the full and unrestricted right to sell the same;

40. Poggio, Gardner and Hernandez knew that the representation contained in paragraph 4(c) of the February 8, 1980 agreement was false. They all knew that Poggio had agreed by the terms of paragraph 7 of the November 8 agreement not to make such a sale.

41. Paragraph 10 of the agreement of February 8 provides as follows:

> 10. Seller and Shareholder's Covenant Not to Compete:
>
> For and in consideration of a note in the principal amount of Eighty Thousand Dollars ($80,000.00) in the form and in substance as set forth in Exhibit "C" SELLER and the principal shareholder of SELLER, Max Poggio, agree not to compete with BUYER in the sale or servicing of new and used Mazda and Fiat automobiles within five miles of the present Orem location of SELLER's premises for a period of five years from closing.

42. A promissory note in the principal amount of $80,000 written in terms almost identical with the payment provisions of the November 8, 1978 agreement was signed by Dinero Services, Gardner, and Hernandez and delivered to Poggio together with the February 8, 1980 agreement.

43. As initially drafted, it appeared that the $80,000 to be paid pursuant to the promissory note provided for by paragraph 10 of the February 8, 1980 agreement was to enable Poggio to pay Ringwood.

44. However paragraph 11 of the February 8, 1980 agreement to the effect indicated in paragraph 43 above, was deleted and the

deletion was initialed by Poggio and by Gardner. Before the deletio that paragraph read as follows:

11. Redemption Agreement:

> SELLER covenants in addition to its other covenants herein to take all steps necessary to satisfy its obligations to Richard W. Ringwood before closing by assigning the promissory note to be delivered herein or otherwise. SELLER will provide proof of such satisfaction at closing.

45. February 8, 1980 was a Friday. After Poggio signed the February 8 agreement Gardner and Hernandez took possession and control of the Mazda and Fiat dealership located in Orem, Utah.

46. Gardner and Hernandez issued checks on February 11, 1980 in payment of pre-February 8, 1980 outstanding debts of Foreign Auto Works and properly charged the sellers for those payments as supported by Exhibit 23 in the amount of $10,381.09 as part of the purchase price which Gardner and Hernandez paid Poggio.

47. Gardner and Hernandez ostensibly under the name of Dinero Services Inc., individually and on behalf of FAW executed a further agreement dated April 14, 1980, "the agreement of April". The agreement of April 14 was prepared by counsel for Gardner and Hernandez. The court finds that said agreement, as well as the agreement of February 8, 1980, were intended to be between Poggio, individually, and on behalf of FAW on the one hand and Gardner and Hernandez on the other; that Dinero Services Inc. was not considered by the parties as an operative entity as far as the dealings between the parties were concerned; that the said agreement of April 14, 1980, was intended by the parties to supercede all previous agreements and dealings between Poggio and

FAW on the one hand and Gardner and Hernandez on the other. This agreement was entered into between the parties because the February 8, 1980, agreement had technically been terminated by the non-occurrence of a condition subsequent (transfer of the Mazda franchise by March 1, 1980), the representations of Mazda that the franchise would not be transferred to an entity which also operated the Fiat franchise, and because of continuing disagreement between the parties as to the value of the assets involved and the debts of FAW which had Bulk Sales implications.

48. The assets to be acquired under the April 14 agreement were as follows:

a. All new current Mazda parts in possession of SELLER as shown in the inventory attached as a part of Exhibit "1";

b. All movable Mazda signs owned by SELLER and in SELLER's possession as shown in the inventory attached as a part of Exhibit "1";

c. All used automobiles owned by SELLER and present on the premises as shown in the inventory attached as a part of Exhibit "1";

d. SELLER's interest in the leasehold in that certain lease attached hereto as Exhibit "2";

e. All furniture, fixtures, and Mazda special equipment in possession of SELLER as shown in the inventory attached as a part of Exhibit "1";

f. In addition to the foregoing assets to be sold, SELLER and each of the principal shareholders of SELLER agree not to compete with the BUYER in the sale of Mazda automobiles as more fully set forth hereinafter.

49. The April 14 agreement provided that the $80,000 note executed in connection with the February 8 agreement be returned by Poggio to Gardner and Hernandez.

50. The February 8 promissory note of $80,000 was returned to Gardner and Hernandez by Poggio's then attorney, Glen Ellis.

51. Paragraph 4 of the April 14 agreement, at page 4, under "Representations of Seller" reads as follows:

> b. SELLER and its shareholder and directors have taken all necessary steps and obtained all necessary approvals for the sale of the property contemplated by this Agreement;

52. Poggio, Gardner, and Hernandez and their counsel all knew that the representation in paragraph 4(b) was false.

53. Paragraph 4(c) of the April 14 agreement reads as follows:

> c. SELLER owns all of the property described in Exhibit "1" and in the Escrow Agreement attached hereto free and clear of all liens, security interests, including taxes and all other encumbrances, and Seller has the full and unrestricted right to sell the same;

54. Poggio, Gardner, and Hernandez and their counsel all knew that the representation in paragraph 4(c) was false. They knew that Poggio and PAW were parties to the November 8, 1978 agreement which prohibited the sale.

55. Gardner and Hernandez and their counsel were aware on November 27, on December 29, on February 8 and on April 14 of the fact that those contracts were in violation of the rights of Ringwood contained in the November 8, 1978 agreement between Poggio, Francis, and Ringwood.

56. Paragraph 7 of the April 14 agreement was entitled "Documents to be Provided at Closing". Paragraph 7(g) reads as follows:

> g. The written consent of Richard W. Ringwood to this

transaction or his covenant not to sue the BUYER or BUYER's principals.

57. Paragraph 8 of the April 14 agreement dealt with the subject of "Closing". Paragraph 8 of the April 14 agreement reads as follows:

> Closing shall occur on the first business day following the date upon which BUYER has obtained (a) from Mazda Motors Pacific a new car franchise and all necessary State licenses for it to conduct the business contemplated by this Agreement;
>
> (b) the consent to the transaction or the covenant of Richard W. Ringwood not to sue the BUYER or its principals; and not later than May 1, 1980.

58. The April 14 agreement provided in paragraph 11 as follows:

> 11. Indemnification Agreement of Individuals:
>
> In this Agreement POGGIO has covenanted to take all steps necessary to satisfy the obligations to Richard W. Ringwood and creditors of SELLER before closing. POGGIO will provide proof of such satisfaction at closing, or in the event he cannot, BUYER will waive these covenants. In the event BUYER should waive these covenants at closing, POGGIO covenants and agrees to hold SELLER harmless and to indemnify SELLER from any and all claims and loss, including costs of investigation and costs and attorneys' fees arising from or relating to this contract and the predecessor hereto, including without limitation the claims of Richard W. Ringwood and the creditors of SELLER under the Bulk Sales Act.

59. The November 27 agreement provided in paragraph 14 that if Gardner and Hernandez were not acceptable to either Mazda or Fiat as either franchisees in their own right or as principal and controlling persons of Foreign Auto Works, then in that event the agreement should become null and void and any and all considerations paid by the buyers to the seller as either the initial purchase price or as monthly payments, including noncompetition

payments, should become immediately repayable from the seller to the buyer.

60. Paragraph 13 of the December 29 agreement provided that:

> In the event that either or both Gardner-Hernandez (Buyers) should not, at the inception of this agreement, be acceptable to either Mazda or Fiat as either franchisees, in their own right, or as the principal and controlling persons of FAW, and no franchise shall be granted to them within 90 days, then in that event this agreement shall become null and void and any and all considerations paid by Buyers to Seller as either the initial purchase price or as monthly installments including non-competition payments, shall become immediately repayable by Seller to Buyers, . . .

61. Paragraph 9 of the February 8 agreement provided that the agreement would be terminated unless Mazda Motors granted a new car franchise to Gardner and Hernandez by March 1, 1980. That paragraph further provided:

> Upon termination of this Agreement SELLER shall immediately return to BUYER any and all sums paid by the BUYER to the SELLER or advanced by the BUYER to the SELLER or its shareholders.

62. Paragraph 9 of the April 14 agreement provided as follows:

> 9. Termination:
>
> This Agreement shall terminate and be of no further force and effect if by May 1, 1980, Mazda Motors Pacific shall not have granted to the BUYER a new car franchise necessary for it to engage in the sale and servicing of Mazda automobiles in the Provo-Orem area and BUYER shall not have obtained the necessary and requisite State licenses. This Agreement shall also terminate if the covenant and agreements of the Escrow Agreement are not fully and faithfully performed when due. Upon termination of this Agreement SELLER shall immediately return to BUYER any and all sums paid by the BUYER to the SELLER or advanced by the BUYER to the SELLER, its shareholders, or creditors under this Agreement or prior hereto.

63. The evidence does not disclose that Gardner and Hernandez

made any demand upon Poggio for the return of any of the consideration paid by Gardner and Hernandez to Poggio after the delivery by Gardner of the $10,000 to Poggio on November 10, 1979.

64. Poggio was on March 31, 1980, and was at the time of trial, indebted to the United States of America for unpaid taxes for the tax period ending March 31, 1980, in the amount of $16,212.70 as shown by plaintiff's Exhibit 33.

65. Poggio did not own a home in February or April of 1980.

66. The real property referred to by the contract of November 27 which was deleted by the contract of December 29 was foreclosed upon by Poggio's creditors. Poggio realized no equity therefrom.

67. The assets of value which Poggio possessed in November and December of 1979 and January, February, and April of 1980 consisted of his equity in Foreign Auto Works and two oil paintings. The two oil paintings purport to have been painted by famous artists and on that basis were appraised for approximately $125,000; the genuiness of the paintings as works of famous artists has not been established and without such certifications, the paintings have a combined market value of approximately $4,000.00; that said paintings were removed by Poggio from the escrow established in connection with the April 14, 1980 Agreement, which removal was not with the approval of Gardner and Hernandez.

68. Gardner and Hernandez tried without success to sell the Fiat franchise between February 8 and April 14 of 1980.

69. Gardner and Hernandez sometime after May 1980 came to

be franchisees of the Mazda franchise and presently operate a Mazda franchise for the sale of new motor vehicles in Provo, Utah.

70. Gardner and Hernandez were aware at all times between November 27, 1979 and April 14, 1980 that Poggio's and Francis's contract with Ringwood precluded the sale of the Foreign Auto Works automobile franchises or of the Foreign Auto Works assets other than in the regular course of business so long as there was an outstanding unpaid purchase price owed Ringwood on Ringwood's contract of November 8, 1978.

71. Between the dates of November 27 and April 14 Hernandez approached Ringwood and requested Ringwood to consent to the sale of the Foreign Auto Works assets to Gardner and Hernandez. Ringwood refused to assent to the transfer unless he was paid the amount owed to him by Poggio and by Francis.

72. Credit for the $10,000 which was paid by Gardner to Poggio on October 29, 1979 and for the monies paid on February 11, 1980 were taken by Gardner and Hernandez upon the purchase price of the April 14 agreement.

73. All of the transactions between Poggio and Gardner and Hernandez considered the principal assets of interest to be the Mazda franchise, the new current Mazda parts, all movable Mazda signs, the interest of the sellers in the leasehold property in Orem, all furniture, fixtures and Mazda special equipment in possession of the sellers. All of the transactions provided for a covenant on the part of the seller not to compete in the

sale of Mazda automobiles.

74. On June 12, 1981 agents of the United States Internal Revenue Service caused a tax lien to be filed against FAW for unpaid taxes for the period ending December 31, 1978 in the amount of $553.65.

75. On June 30, 1981 agents of the United States Internal Revenue Service caused a tax lien to be filed against FAW asserting unpaid taxes for the period ending December 31, 1979 in the amount of $5,246.52.

76. On December 24, 1980, agents of the Internal Revenue Service caused a tax lien to be filed against FAW asserting unpaid taxes in the amount of $3,976.66 for the period ending December 1979.

77. On May 13, 1980 agents of the Internal Revenue Service caused a tax lien to be filed against FAW asserting unpaid federal taxes for the period ending June 1979 in the amount of $8,475.18.

78. On March 3, 1980 agents of the Internal Revenue Service caused tax liens to be filed against FAW asserting unpaid federal taxes in the amount of $6,414.17 for the period ending September 1979.

79. On July 14, 1980 agents of the Internal Revenue Service caused tax liens to be filed with the Utah County Recorder against FAW asserting unpaid Federal taxes in the amount of $4,124.18 for the period ending March 1980.

80. On May 20, 1981 agents of the Internal Revenue Service

caused tax liens to be filed with the Utah County Recorder asserting that Poggio owed unpaid Federal taxes in the amount of $16,212.70 for the period ending March 1980. (See paragraph 64 above.)

81. Plaintiff Poggio's Exhibit 32 evidences a warrant filed with the office of the Utah County Clerk by the State of Utah asserting unpaid taxes by FAW from April 1, 1979 to June 6, 1979 in the amount of $9,994.72.

82. Irrespective of the foregoing, the evidence is insufficient for the court to find by a preponderance that either Poggio or FAW was insolvent during any time when Ringwood was a third party beneficiary of any contract between Gardner and Hernandez as promissors and Poggio or FAW as promissee, particularly by reason of the uncertain value of Poggio's paintings and the absence of evidence as to the value of the FAW stock, all of which Poggio was the owner or contract purchaser.

83. The unpaid balance of the purchase price owed Ringwood as set forth in the November 8 agreement is the sum of $80,024.84 principal. Interest is unpaid on the purchase price since the 12th day of January, 1980 and is owed in the amount of $56,700.12 to October 15, 1986 and at the rate of $23.02 per day thereafter.

84. Plaintiff Ringwood had employed counsel and had agreed to compensate counsel. Ringwood's attorney, Dallas H. Young, Jr., was sworn and testified that his office had rendered services in the principal amount of $14,041.85 to the date of October 13, 1986, which counsel for plaintiff voluntarily reduced

at the time of trial by the sum of $3,000 and testified that Ringwood was obligated for the unpaid portion of that amount; that the amount charged was reasonable and that the work performed was necessary in the prosecution of the case.

85. That Gardner and Hernandez have paid or committed the following sums pursuant to said agreement of April 14, 1980:

(a) $75,076.79 acknowledged by Poggio on or about April 14, 1980; (the court finds that with respect to defendant's Exhibits 27 and 28, these matters were taken into account in arriving at the figure of $75,076.79 acknowledged by Poggio as having been received and that as a consequence thereof Poggio was entitled to receive the funds represented by said Exhibit 28)

(b) $15,000 on or about April 15, 1980;

(c) $10,000 on or about July 31, 1980;

(d) With respect to payments claimed to have been made by Gardner and Hernandez upon said note by way of offsets allowed under paragraph 10 of the April 14, 1980 agreement (plaintiff's Exhibit No. 10), the court finds as follows:

(1) Gardner and Hernandez did not receive titles to cars included in the sale in the amount of $13,649.90 (see plaintiff's Exhibit 12, plaintiff's Exhibit 15 and defendant's Exhibit 30)

(2) The evidence does not support the claim of Gardner and Hernandez for an offset in the amount of $13,907.53 for alleged "Payment to First Security by Zions to cure Fiat 'out of Trust'".

(3) The evidence does not support the claim of Gardner and Hernandez for an offset in the amount of $12,600 for Poggio's collection of Mazda and Fiat warranty payments.

(e) With respect to Exhibit 4 attached to plaintiff's Exhibit No. 4 (Note claimed by Poggio to be for $80,000.00) and Exhibit 4 appended to plaintiff's Exhibit No. 10 (Note claimed by Gardner and Hernandez to be for $30,583.02) the court finds that neither note has been established by a preponderance of the evidence as representing a part of the agreement between the parties. (See, however, plaintiff's Exhibit 5 [personal hand-written memos of Poggio]) which contain the figure of $30,583.02, which figure is more nearly consistent with the balance purchase price after deducting the items noted in (a) (b) and (c) above.)

86. That Gardner and Hernandez claim to have paid $6,500.00 as attorney fees in defending the claims of Ringwood; that the evidence does not provide information in support of the reasonable-ness of such charges or the necessity for and nature of the work generating such charges.

87. That there is no evidence to support a contention that the purchase price agreed to be paid by Gardner and Hernandez for the subject assets under the agreement of April 14, 1980 was unfair or was disproportionate to the value of such assets.

88. Poggio in his agreements with Ringwood initially and in subsequent negotiations and contractural relationships with Hernandez and Gardner acted of his own free will, generally

with the benefit of the advice of legal counsel, and not under threat or duress.

89. Ringwood filed an action on February 4, 1985 against defendants Gardner and Hernandez claiming as a third party beneficiary of the agreement dated November 27, 1979.

90. The parties to the November 27, 1979 agreement intended Ringwood to be a third party beneficiary thereof.

91. Ringwood did not rely upon, assent to or sue on the November 27, 1979 agreement prior to the time when Poggio as seller and Gardner and Hernandez as buyers entered into the agreement of December 29, 1979.

92. Ringwood did not rely upon, assent to or file an action on the December 29, 1979 agreement prior to the time when Foreign Auto Works as seller and Dinero Services, Inc. as the ostensible buyer entered into the February 8, 1980 agreement.

93. Ringwood was intended to be an incidental beneficiary only of the February 8, 1980 and April 14, 1980 agreements between Poggio and Gardner and Hernandez.

94. Poggio and FAW on the one hand and Gardner and Hernandez on the other intended that the April 14, 1980 agreement should supercede all previous agreements between them; that the subject matter of the April 14, 1980 agreement arose out of the same basic dealings and causes as all said prior agreements between the parties.

95. That Gardner and Hernandez still owe the sum of $20,330.27 on said purchase price on the agreement of April 14,

1980, and judgment should be granted to Poggio and FAW for such amount, plus interest at the legal rate from April 14, 1980 together with costs of court herein expended by reason of such claim. Evidence was not offered with respect to any claim for attorney fees.

96. Gardner and Hernandez have failed to support their claim for attorney fees as an offset to the claim of Poggio in that there is nothing in the record to show the reasonableness of the claimed charges nor of the necessity for the services alleged to have been performed.

Based upon the foregoing, the court now makes and enters the following:

CONCLUSIONS OF LAW

1. Claims of Ringwood against Poggio, et ux., Francis and FAW:

(a) The decision of this court in Case No. 53579, affirmed by the Utah Supreme Court of Utah (671 P. 2d 182) was not a decision on the merits of Ringwood's claims for the sale of his stock and such decision is not res judicata so as to preclude Ringwood from pursuing claims under the Agreement of November 8, 1979.

(b) The said defendants Poggio and Francis have defaulted in payments required under said agreement and have breached the terms thereof by reason of the sale of FAW assets without the approval or consent of Ringwood and the sale of stock between Francis and Poggio.

(c) Ringwood's remedy is not limited to a forfeiture of money paid by defendants but is entitled to pursue his claims for the balance of the agreed purchase price under the provision of paragraph 9 of said agreement which recites: "... and further, Seller shall be free to pursue any other legal and equitable remedies available to Seller."

(d) Defendants Massimo C. Poggio, Rebecca Jane Poggio, Howard R. Francis and Foreign Auto Works Inc. are indebted to Ringwood in the principal sum of $80,024.84, with interest to December 22, 1986 in the amount of $58,265.48 and thereafter to date of judgment in the amount of $23,02 per day; that Ringwood has incurred reasonable attorney fees in the sum of $11,041.85 by reason of the default in performance of said defendants; that Ringwood is entitled to judgment against said defendants and each of them for the amounts above set forth together with costs of court incurred.

2. Claims of Ringwood against Anthony Hernandez and Hugh Gardner.

(a) The evidence does not support the alleged claim of a malicious and intentional conspiracy to deprive Ringwood of his rights and such claim should be dismissed with prejudice.

(b) The claim for rescission alleged in the Fifth Cause of Action of Ringwood's Second Amended Complaint is not supported by the evidence and should be dismissed with prejudice.

(c) Ringwood's alleged claim in special assumpsit should be dismissed on the grounds that the evidence does not

show by a preponderance that the price agreed to be paid by Gardner and Hernandez for certain assets of FAW was disproportionate to the value thereof.

(d) Ringwood's claim that he was a third-party beneficiary of agreements between Poggio and Hernandez and Gardner is not supported by a preponderance of the evidence and should be dismissed with prejudice for the following reasons:

(1) Ringwood was only an incidental beneficiary of the February 8, 1980 agreement and the superceding agreement of April 14, 1980.

(2) Although Ringwood may have been a third-party beneficiary under the November 27, 1979 and December 29, 1979 agreements, such agreements were superceded before Ringwood in any way assented thereto, relied upon or changed any position as a consequence thereof. There is evidence in the record to show Poggio was in financial difficulty in February and April 1980.

(e) The evidence does not preponderate in support of the contention that Poggio or FAW was insolvent at a time when Ringwood was a third party beneficiary because of the unknown value of Poggio's paintings and the complete lack of evidence as to the value of FAW stock all of which was held by Poggio or under contract to him; that in any event the evidence fails to demonstrate by a preponderance that the agreed price to be paid by Hernandez and Gardner for FAW assets was disproportionate to the fair value thereof;

(f) That all of Ringwood's claims against Gardner and Bernandez or either of them should be dismissed with prejudice and such defendants should be awarded their costs of court expended in defense of such claims.

3. Claims of Poggio and FAW against Gardner and Hernandez:

(a) The April 14, 1980 Agreement is the subsisting agreement between said parties; that Dinero Services Inc. was not intended by the parties to be the contracting party but that Gardner and Bernandez were the actual buyers and were obligated as such.

(b) That the agreement of April 14, 1980 arises out of the initial transactions between the same parties; that the cause of action alleged in the Amended Complaint filed October 16, 1986, relates back to the time of the filing of the original cause of action and thus is not barred by the statute of limitations.

(c) That Gardner and Hernandez still owe the sum of $20,330.27 on said purchase price and judgment should be granted to Poggio and FAW for such amount, plus interest at the legal rate from April 14, 1980 together with costs of court herein expended by reason of such claim. The legal rate of interest on the contract debt is the amount of 6% per annum until the date of judgment.

4. Counterclaim of Dinero Services Inc. and Gardner and Hernandez against Poggio and FAW:

(a) Said counterclaim should be dismissed with prejudice.

The evidence by a preponderance shows that Gardner and Hernandez have failed to fully meet their commitments under said agreement. Gardner and Hernandez have failed to support their claim for attorney fees as an offset in that there is nothing in the record to show the reasonableness of the claimed charges nor of the necessity for the services alleged to have been performed.

Dated: June 4, 1987.

BY THE COURT:

s/ Cullen Y. Christensen
CULLEN Y. CHRISTENSEN, Judge.

APPROVED AS TO FORM:

VAL R. ANTCZAK
Attorney for Defendants
Gardner and Hernandez

ROBERT C. FILLERUP
Attorney for Plaintiffs Massimo C.
Poggio and Rebecca Jane Poggio

APPENDIX C

EXHIBIT 1

VAL R. ANTCZAK
JULIA C. ATTWOOD
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Defendants
Hugh Gardner and Anthony R.
Hernandez
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

* * * * * * * *

RICHARD W. RINGWOOD, Plaintiff, vs. FOREIGN AUTO WORKS, INC., and HOWARD R. FRANCIS, MASSIMO C. POGGIO, REBECCA JANE POGGIO, individually and in their capacities as shareholders, directors, officers or agents of FOREIGN AUTO WORKS, INC., ANTHONY HERNANDEZ and HUGH GARDNER, Defendants.	MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS Civil No. 60,654
MASSIMO "MAX" POGGIO and FOREIGN AUTO WORKS, INC., Plaintiffs, vs. HUGH GARDNER and ANTHONY R. HERNANDEZ, Defendants.	

* * * * * * * *

On September 10, 1986 this Court allowed the plaintiffs to amend their Amended Complaint to state a claim for breach of the April 14, 1980 Agreement. Plaintiffs filed their Amendment to Amended Complaint on October 11, 1986.

These defendants have earlier argued to the Court that the proper defendant to an action on the April 14, 1980 Agreement is Dinero Services. Certainly, an action against Dinero Services, a new party, would not relate back to the original filing of this Complaint under Rule 15(c) of the Utah Rules of Civil Procedure. The Court has already ruled against these defendants on that issue, concluding that defendant Hernandez and Gardner are the real parties in interest. These defendants will not attempt to reargue that ruling.

Even assuming, however, that an action based on the April 14, 1980 Agreement does not require the addition of a new defendant, the amendment does not meet the standard under Rule 15(C) of the Utah Rules of Civil Procedure for relation back:

> (c) whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence, set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the orginal pleading.

The only arguable reference to the April 14, 1980 Agreement in the Amended Complaint is contained in paragraphs 9 and 10:

> 9. Defendants induced plaintiffs to enter into Agreements subsequent to the Agreement of December 29, 1979, but such subsequent agreements were without consideration to plaintiffs and should therefore be declared null and void.
>
> 10. Plaintiffs are entitled to a declaratory judgment declaring agreements entered into between the parties subsequent to December 29, 1979 agreement to be null and void and of no force and effect and declaring the Agreement of December 29, 1979 to be the only bonding and valid agreement between the parties.

As has been stated under the federal rule, "the primary purpose of Rule 15(c) is to assure that defendants have received adequate notice of claims within the limitations period and will not be unduly prejudiced by amendments to the complaint." Kaminski v. Metropolitan Life Ins. Co., 586 F.Supp. 384, 386 (S.D.N.Y. 1984). The allegations of the Amended Complaint certainly cannot be said to have put these defendants on notice that plaintiffs would claim breach of the April 14, 1980 Agreement. Indeed, the allegations of the Amended Complaint, that the December 29, 1979 Agreement alone was valid, lead to exactly the opposite conclusion. Plaintiff now seeks to sue on a totally independent contract and such a claim is certainly time barred:

Plaintiff's amendment falls squarely within Professors Wright and Miller's description of claims time barred under Rule 15.

> When plaintiff attempts to allege an entirely different transaction by amendment, as, for example, the separate publication of a libelous statement or the breach of an independent contract, the new claim will be subject to the defense of statute of limitations.
>
> Wright & Miller, 6 Federal Practice and Procedure § 1497 at 489-90 (1971). . .

Emphasis supplied; Id. at 386. Plaintiffs are attempting to state claims which are clearly barred by the six year statute of limitations. Utah Code Ann. § 78-12-23 (1953). The claim stated in the Amendment to Amended Complaint does not arise out of the transaction or occurrence which was alleged in the Amended Complaint and therefore cannot relate back to the date of filing the Amended Complaint. Consequently, the claim stated in the Amendment to the Amended Complaint should be dismissed with prejudice.

DATED this 14th day of October, 1986.

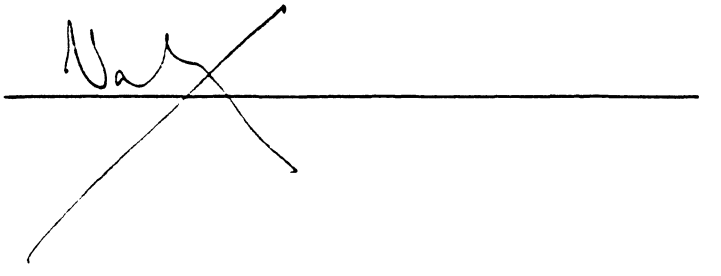
VAL R. ANTCZAK
JULIA C. ATTWOOD
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Defendants
Hugh Gardner and Anthony R. Hernandez
185 South State Street, Suite 700
P. O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be delivered a copy of the foregoing Memorandum in Support of Defendant's Motion to Dismiss to the following this 14th day of October, 1986.

Dallas H. Young, Jr.
Ivy & Young
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

Robert C. Fillerup
1103 South Orem Blvd.
Orem, Utah 84058



252:101386B

EXHIBIT 2

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

RICHARD W. RINGWOOD,

Plaintiff,

vs.

FOREIGN AUTO WORKS et al,

Defendants.

CASE NUMBER: 60,654 (65,314)

RULING

This matter comes before the Court, under Rule 2.8, on the motions of various parties seeking relief as hereinafter indicated. The Court has reviewed the file, considered the memoranda of counsel, entertained argument of counsel, and upon being advised in the premises, now makes the following:

RULING

1. Motion of Defendants Gardner and Hernandez for partial Summary Judgment

(a) Said motion is denied as to Plaintiffs Poggio and Foreign Auto Works. While it is conceded by said Defendants Gardner and Hernandez that such Defendants were the actual parties to the agreement of April 14, 1980, the Court is of the opinion that a legitimate question of fact remains as to whether or not Plaintiff signed the April 14, 1980, agreement under duress.

(b) Said motion as to Plaintiff Ringwood is denied. The Court is of the opinion that the claims of Ringwood against Hernandez and Gardner are "founded upon an instrument in writing" (Agreement of December 29, 1979) and thus governed by the six year statute of limita-

tions (Sec 78-12-23(2) UCA).

The Court is further of the opinion that questions of fact remain concerning whether the contract upon which Ringood's third party beneficiary claims are based was rescinded before such third party claims could effectively attach and whether in any event Hernandez and Gardner exercised such dominion over the assets of FAW as should preclude them from excaping liability to Ringwood.

2. Motion of Ringwood for Summary Judgment

(a) Said motion is denied.

Dated this 2 day of September, 1986.

BY THE COURT:

CULLEN Y. CHRISTENSEN, JUDGE

cc: Dallas H. Young, Esq.

Robert C. Fillerup, Esq.

Val R. Antczak & Julie Attwood, Esq.

EXHIBIT 3

F. ROBERT REEDER
VAL R. ANTCZAK
JULIA C. ATTWOOD
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Defendants
Hernandez and Gardner
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, UT 84147-0898
Telephone: (801) 532-1234

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

* * * * * * *

RICHARD W. RINGWOOD, Plaintiff, vs. FOREIGN AUTO WORKS, INC., and HOWARD R. FRANCIS, MASSIMO C. POGGIO, REBECCA JANE POGGIO, individually and in their capacities as shareholders, directors, officers or agents of FOREIGN AUTO WORKS, INC., ANTHONY HERNANDEZ and HUGH GARDNER, Defendants.	MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT Civil No. 60,654
MASSIMO "MAX" POGGIO and FOREIGN AUTO WORKS, INC., Plaintiffs, vs. HUGH GARDNER and ANTHONY R. HERNANDEZ, Defendants.	Civil No. 65,314

* * * * * * *

Defendants Hernandez and Gardner hereby submit the following Memorandum of Points and Authorities in support of their Motion for Partial Summary Judgment in this action:

UNCONTROVERTED FACTS

1. On November 27, 1979, Max Poggio entered into an agreement (the "November Agreement") with Hugh Gardner and Tony Hernandez in which it was agreed that Gardner and Hernandez would purchase all of the outstanding stock of Foreign Auto Works, Inc. ("FAW") from Poggio. [Exhibit A]

2. The November Agreement included the purchase by Gardner and Hernandez of Poggio's covenant not to compete, as well as the sale to Hernandez and Gardner of certain real property located in Orem, Utah. In addition, Hernandez and Gardner agreed to assume Poggio's responsibilities to Richard Ringwood arising from Poggio's contract to purchase 15,000 shares of FAW stock from Ringwood. [Ex. A; Depo. I, p.27][1][Citations to "Depo. I" refer to the deposition of plaintiff Poggio dated March 8, 1984. Similarly, citations to "Depo. II" will refer to plaintiff Poggio's deposition dated June 10, 1986.]

3. On December 29, 1979, Poggio, Gardner and Hernandez executed another contract (the "December Agreement"), the terms of which were essentially identical to those of the November Agreement, with the exception that the subsequent

agreement eliminated the real property purchase. The purchase price set forth in the December Agreement was therefore lower than that in the November Agreement. [Ex. B; Depo I, p. 35]

4. Both the November and December Agreements provided for transfer to Hernandez and Gardner of automobile dealer franchises from Mazda Motors and Fiat Motors, and required Poggio's resignation as an officer and director of FAW. The purchase price under each agreement was determined, in part, by the outstanding liabilities of FAW, which were set forth by Poggio in exhibits to the agreements. [Exs. A & B]

5. Within a matter of days after the execution of the December Agreement, the parties became involved in a number of disputes with respect to their performance under the contract, including, among other things, the existence of clear title to several automobiles that were transferred under the contract, the actual value of FAW's liabilities and Poggio's ability to transfer the Mazda and Fiat franchises. Numerous discussions took place between the parties regarding these matters. [Depo. I, pp. 50, 76, 80, 100-101]

6. During December of 1979 and January of 1980, Poggio continued to operate the FAW store in Orem, although some employees of Hernandez and Gardner began working there as well. Hernandez and Gardner did not take over operation of the store until sometime in February of 1980. [Depo II, pp. 21-22]

7. The months of December, 1979 and January, 1980 were "bad months" for the FAW store, resulting in losses and the incurrence of additional FAW liabilities. [Depo. I, pp. 48, 83]

8. On February 8, 1980, Poggio, Gardner and Hernandez executed yet another agreement (the "February Agreement") with respect to the purchase of FAW. The February Agreement changed the terms of the contract to eliminate the purchase of FAW stock, and provided instead that Gardner and Hernandez would purchase essentially all of the company's assets. [Ex. C]

9. Although the named parties to the February Agreement were "Foreign Auto Works, Inc." and "Dinero Services, Inc.," the actual parties were in fact Poggio, Gardner and Hernandez, and Poggio testified that he believed that he was at all times dealing with the same party. [Ex. C; Depo. I, pp. 47, 82, 123-24]

10. The February Agreement also eliminated any assumption by Hernandez and Gardner of Poggio's outstanding liability to Ringwood. [Ex. C]

11. On April 14, 1980, Poggio, Gardner and Hernandez executed a final agreement (the "April Agreement") with respect to the sale and purchase of the assets of FAW. The April Agreement refers to the February Agreement, and expressly

provides that it "shall supplant and supersede all earlier agreements between these parties relating to the same subject matter." [Ex. D ¶ 12].

12. Under the April Agreement, Gardner and Hernandez did not agree to purchase any FAW stock, and did not agree to assume any liability for Poggio's debt to Ringwood. [Ex. D]

13. Throughout these negotiations, both Poggio and Hernandez and Gardner were represented by attorneys, and in fact, at least some of the agreements were prepared and reviewed by attorneys on the parties' behalf. [Depo. I, pp. 14, 38, 117-18]

14. On November 30, 1983, Poggio sued Hernandez and Gardner for breach of the November Agreement. [Complaint & Summons]

15. On January 26, 1984, Poggio amended his Complaint to drop the claims based upon the November Agreement, and to allege instead a cause of action on the December Agreement. [Amended Complaint]

ARGUMENT

In making this motion, defendants have not submitted affidavits, nor relied in any way upon the testimony of either Hernandez or Gardner. The facts as stated herein are assumed to be true solely for the purposes of this motion, and were derived entirely from the pleadings and the testimony of

plaintiff Poggio. As such, there can be no dispute as to the material facts that have been stated herein.

There is no dispute between the parties to this action regarding the fact that, as of November 27, 1979, Poggio, Hernandez and Gardner had a contract for the sale and purchase of the business known as Foreign Auto Works. There is likewise no dispute as to the fact that those parties subsequently executed three additional contracts, all relating to the same sale and purchase of FAW, although the precise terms of the subsequent agreements varied. Nonetheless, Mr. Poggio has chosen to assert claims in this action against Mr. Hernandez and Mr. Gardner on the basis of the December Agreement, the second in the parties' series of four agreements. Poggio had initially asserted claims based upon the November Agreement, but subsequently amended his Complaint to allege December Agreement claims on the basis of defendants' Motion to Dismiss, and an Affidavit by Tony Hernandez. Thus, plaintiff Poggio has clearly taken the position in this action that the December Agreement superseded and replaced the November Agreement. Likewise, the December Agreement was replaced by the February Agreement, which was ultimately superceded by the April Agreement.

It is well established in Utah, as elsewhere, that a contractual agreement may be superseded by a subsequent

agreement which is between the same parties and covers the same subject matter. Thus, in the previous proceedings between plaintiffs Poggio and Ringwood, the Utah Supreme Court held that Poggio's promissory note for the purchase price of Ringwood's FAW stock was merged into, and superseded by, a subsequent written agreement between those parties for the sale and purchase of the same FAW stock. Ringwood v. Foreign Auto Works, Inc., 671 P.2d 182 (Utah 1983). In its decision, the Court considered that the contract and the note contained many similar provisions, and that correspondence between the parties' attorneys indicated that the subsequent agreement was intended to be a final settlement of controversies between the parties, and ruled that the contractual agreement should prevail. The court also found, incidentally, that the two agreements were between the same parties, although the note had been signed by Poggio individually and the contractual agreement was between Ringwood and FAW, since in reality, the contract purchaser was Poggio.

The facts of the present case are even more compelling. In this case, there are four separate agreements between the same parties, all of which deal exclusively with the sale and purchase of FAW. Each of the agreements executed subsequent to the November Agreement resulted directly from disputes between the parties, and constituted an effort to

resolve those disagreements. All parties were represented by their own legal counsel throughout their dealings with each other, each of whom independently prepared, reviewed and modified various of the agreement terms. Finally, the April Agreement provides a clear expression of the parties' intent by stating that "this Agreement shall supplant and supersede all earlier agreements between these parties relating to the same subject matter." It is difficult to imagine what more these parties could have done to have more clearly expressed an intent to integrate their prior contracts into the final April Agreement than what they actually did. Nor has plaintiff Poggio ever suggested that such was not the intent of the parties in executing the subsequent agreements.

Poggio offers two explanations for his reliance upon the December Agreement in this action: Lack of consideration for, and/or duress in connection with, the subsequent agreements. How plaintiff is able to differentiate between the December and the February and April Agreements in these respects is not clear. However, it must be assumed from the pleadings in this action that neither consideration nor duress is at issue with respect to the December Agreement, although that agreement similarly modifies a prior one.

With respect to plaintiff's duress claim, Poggio specifically denied that his signing of the agreements with

Gardner and Hernandez was as the result of any threats made against him, and testified that he was not intimidated into signing those contracts. In fact, Poggio's testimony with respect to "duress" was as follows:

> Q. Given that you admit that the February 8th and April 14, 1980 agreements were signed by you, why have you decided to sue on the December 27, 1979 agreement?
>
> A. Because I believe that's the binding agreement. I signed the other agreements out of necessity.
>
> Q. Out of necessity?
>
> A. My own. The necessity of survival.
>
> Q. You needed money?
>
> A. I needed to do something with that because I couldn't sell it to somebody else because they had it and they had me over a barrel and I had to do something.
>
> Q. Did they hold a gun to your head or otherwise coerce you physically?
>
> A. No.

[Depo. I, p. 117]. Interestingly, throughout his dealings in connection with these contracts, Poggio actively sought and received the advice of his independent counsel. As such, the only fact upon which Poggio relies in support of his duress claim is that he believed that, financially, he had no choice but to sign the agreements.

Such a claim is clearly insufficient to support a duress defense to a contract within the State of Utah. In fact, the elements of a duress defense in Utah are as follows:

> Thus, to invalidate a contract, a party thereto must show (1) that the other contracting party committed a wrongful act (2) which put the initial party in fear (3) such as to compel him to act against his will.

Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980). In this case, Poggio has failed to offer any evidence whatsoever which would satisfy any one of the three elements of duress specified by the Utah Supreme Court. Therefore, his duress claim with respect to the February and April Agreements is simply without merit.

Regarding plaintiff's consideration argument, each contract subsequent to the November Agreement was in fact supported by adequate consideration, since each of those contracts constituted an attempt by the parties to compromise disputes that had arisen in connection with their respective performances. In fact, Poggio testified that the parties were involved in constant disputes beginning almost immediately after their execution of the December Agreement. Poggio further testified that he accepted money from Hernandez and Gardner during the course of these disputes, which was not money due under the terms of the December Agreement. [Depo. I, pp. 64-65] It is well settled that the compromise of

legitimate disputes arising under a contract provides sufficient consideration to support a subsequent contract. See e.g., Burt v. Horn, 97 N.M. 515, 641 P.2d 546 (Ct.App. 1982); Jim's Water Service, Inc. v. Alinen, 608 P.2d 667 (Wyo. 1980); Fieser v. Stinnett, 212 Kan. 26, 509 P.2d 1156 (1973), as does an additional tender of value. Both kinds of consideration exist in the present case, and as such, plaintiff's argument that the contracts subsequent to the December Agreement were not supported by consideration is simply not supported by the uncontroverted facts.

In addition, the Utah Legislature has provided in the Uniform Commercial Code, that "an agreement modifying a contract within this chapter needs no consideration to be binding." Utah Code Ann. § 70A-2-209. This principle is especially appropriate where, as here, the contracting parties are sophisticated businessmen, dealing at arm's length, with the benefit of independent legal counsel. Therefore, if the contracts at issue in this action fall within the scope of Utah's U.C.C., then plaintiff's lack of consideration argument is similarly without merit.

CONCLUSION

Defendants are entitled to judgment in their favor, as a matter of law, as to any and all claims in these actions which are based upon the November 27, 1979 or the December 29,

1979 contract between them and plaintiff Poggio, since those agreements were superseded in their entirety by two subsequent contracts.

DATED this 27th day of June, 1986.

VAL R. ANTCZAK
JULIA C. ATTWOOD
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Defendants
Hernandez and Gardner
185 South State Street, Suite 700
P. O. Box 11898
Salt Lake City, UT 84147-0898
Telephone: (801) 532-1234

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT to the following on this 27th day of June, 1986:

Dallas H. Young, Jr.
IVIE & YOUNG
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

Robert C. Fillerup
1103 South Orem Boulevard
Orem, Utah 84058

6889T

EXHIBIT 4

F. ROBERT REEDER
VAL R. ANTCZAK
JULIA C. ATTWOOD
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Defendants
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

* * * * * * * *

RICHARD W. RINGWOOD, Plaintiff, vs. FOREIGN AUTO WORKS, INC., and HOWARD R. FRANCIS, MASSIMO C. POGGIO, REBECCA JANE POGGIO, individually and in their capacities as shareholders, directors, officers or agents of FOREIGN AUTO WORKS, INC., ANTHONY HERNANDEZ and HUGH GARDNER, Defendants.	REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT Civil No. 60,654
MASSIMO "MAX" POGGIO and FOREIGN AUTO WORKS, INC., Plaintiffs, vs. HUGH GARDNER and ANTHONY R. HERNANDEZ, Defendants.	Civil No. 65,314

* * * * * * * *

Defendants Hernandez and Gardner, by and through their attorneys, hereby submit the following memorandum in support of their motion for partial summary judgment in this action:

ARGUMENT

Defendants Hernandez and Gardner have moved for partial summary judgment in this action on the ground that the majority of plaintiffs' claims are based upon supposed legal rights arising out of an agreement between plaintiff Poggio and defendants dated December 29, 1979, which agreement was superseded and replaced by two subsequent contracts. Plaintiff Poggio's response to the motion is based almost exclusively upon the existence of a previous motion to dismiss and the accompanying Affidavit of Anthony Hernandez. Plaintiff argues from those two documents that defendants have somehow admitted that the December Agreement is the only valid contract.

The Hernandez Affidavit and the memorandum in support of the motion to dismiss have been attached hereto as Exhibits A and B for the Court's reference. These documents speak for themselves. However, it is clear from even a cursory review of them that nothing contained therein even remotely resembles a statement or admission that the December Agreement is the only valid contract between the parties. Essentially, both documents simply state that "a second agreement was entered into,"

subsequent to the November Agreement, which superseded that contract in its entirety. The memorandum adds an argument to the effect that the December Agreement was supported by consideration, and therefore validly superseded the previous contract. There is no suggestion, in either the Affidavit or the memorandum, that the February and the April Agreements are in any way defective. Nor was it defendants' intention to mislead plaintiff in any way by their reliance upon the December Agreement, rather than on either of the subsequent ones.

The choice to use the December Agreement in connection with the motion to dismiss was a tactical decision made by defendants' counsel in order to simplify the arguments in favor of the motion. At that time, prior to the taking of any discovery, it was simply considered to be less complicated to defeat the complaint with the next most subsequent contract, which agreement was clearly between the "same" parties, and which expressly provided that it was intended to supersede the previous one. In fact, defendants fully expected that plaintiff would refile his complaint on the basis of the April, rather than the December, Agreement.

In any event, nothing that has transpired in this case can reasonably or fairly be construed as a binding admission by defendants that the contracts subsequent to the December

Agreement were, or are, in any way defective. As indicated in defendants' previous memorandum, there are no material issues of fact with respect to the validity of the contracts executed subsequent to the December Agreement. Plaintiff has admitted that he signed all four of the agreements, that he did so in the absence of the compulsion necessary for the defense of duress, that he was represented by counsel, and that the subsequent agreements were supported by legally valid consideration. Plaintiff briefly alleges in his current memorandum that the subsequent agreements (1) were between "different" parties, and (2) are not considered by him to be "valid." Neither one of these allegations is sufficient to defeat defendants' entitlement to judgment in their favor as a matter of law.

With respect to plaintiff's first argument, the evidence is uncontroverted that the individuals involved in all of the contracts were identical, and that all of them believed that they were dealing with the same parties at all times. (See Defendants' previous memorandum; Deposition of Plaintiff Poggio, dated March 8, 1984, pp. 47, 82, 123-24.) Substantially similar facts in connection with the Ringwood/Poggio agreements were considered by the Utah Supreme Court to be sufficient to establish that the two agreements in that case were between the "same" parties. See Ringwood v. Foreign Auto Works, Inc., 671 P.2d 182

(Utah 1983). To hold otherwise would be the elevation of form over substance in its most basic sense.

Secondly, plaintiff's mere allegation that he does not consider the subsequent agreements to be valid is simply not sufficient to undermine those agreements' inherent validity. Plaintiff has offered no evidence in support of this allegation, beyond his assertions that the subsequent contracts were the result of duress, and offering the statement by defendants that they believed they were "paying too much for the store." In connection with this motion only, defendants do not dispute that such a statement was made. However, the statement itself is entirely consistent with the uncontroverted evidence that the series of agreements arose out of the parties' disputes with respect to the value of the store, which had been determined, in part, by the existence of liabilities and the stated value of the inventory. Certainly, in light of this disputes, defendants believed that they were in fact "paying too much" for what they would receive. Plaintiff does not argue in this regard that there were not in fact ongoing disputes between the parties, and the agreements themselves recite the existence of valid consideration.

Moreover, as detailed in defendants' previous memorandum, plaintiff in fact received and accepted additional

consideration from defendants in connection with the execution of the February and April Agreements. Plaintiff's current conclusory statement to the effect that the subsequent contracts "are not valid" is not sufficient, without reference to specific facts, to create a material issue of fact which would be sufficient to defeat defendants' motion in this case. See Williams v. Melby, 699 P.2d 723 (Utah 1985); Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776 (Utah 1984).

CONCLUSION

Defendants are entitled to judgment in their favor as a matter of law with respect to any claims made against them in this action which are based upon the December or the November agreements between the parties, for the reason that those contracts were superseded and replaced by subsequent contracts between the parties.

DATED this 15th day of July, 1986.

JULIA C. ATTWOOD
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Defendants
185 South State Street, Suite 700
P. O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234